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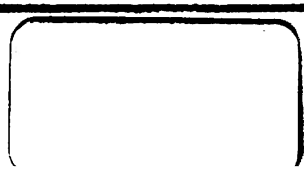

REPORTS OF CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

THE STATE OF VERMONT.

VOLUME XV.

FOURTH SERIES,—VOLUME I.

BY WILLIAM SLADE.

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1844.

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JUSTICES OF THE SUPREME COURT,

DURING THE TIME EMBRACED IN THESE REPORTS.

CHARLES K. WILLIAMS, *Chief Justice.*

STEPHEN ROYCE,
ISAAC F. REDFIELD,
MILO L. BENNETT,
WILLIAM HEBARD,
} *Assistant Justices.*

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REPORTS.

CHITTENDEN COUNTY.

JANUARY TERM, 1843.

PRESENT HON. CHARLES K. WILLIAMS, *Chief Justice.*
" ISAAC F. REDFIELD, } *Assistant Justices.*
" MILO L. BENNETT, }
" WILLIAM HEBARD, }

TREASURER OF VERMONT *v.* JACOB ROLFE.

A recognizance entered into before the county court, by a person in custody on a criminal charge, that the respondent shall make his personal appearance before the court then sitting, and remain from time to time, and from day to day, and shall answer, and shall abide the orders and decrees of the court, and not depart without leave, is a legal and valid recognizance.

SCIRE FACIAS on a recognizance entered into before the county court for the county of Chittenden, by the defendant and one Henry Hand as sureties for John Williams, in custody on a warrant from said court.

The declaration having set forth an indictment against Williams—its return into court, and his arrest, and detention in custody, upon a warrant issued thereon, alleged that:

"On the 4th day of September, 1839, at Burlington aforesaid, by order and direction of the county court aforesaid, the said John Williams, as principal, and Jacob Rolfe and Henry Hand, as sureties, came personally before the judges of the court aforesaid, as by the record of said county court will more fully appear, and, in open court, acknowledged themselves jointly and severally indebted to the treasurer

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'of the state of Vermont in the sum of four hundred dollars, 'to be levied of their, and each of their goods and chattels, 'lands and tenements, and, for want thereof, upon their and 'each of their bodies, upon the condition following, to wit, 'that if the said John Williams, being charged, as specified 'in the said bill of indictment, shall make his personal ap- 'pearance before the county court then sitting at Burlington 'aforesaid, and remain from time to time, and from day to 'day, and then and there answer to such matters and things as 'should then and there be objected to him in that behalf, and 'there abide such order and decree of said court, as said court 'should make in the premises, and not depart without leave 'of said court, then the said recognizance should be void 'and of no effect, but otherwise it should be and remain in 'full force and effect;—which said recognizance and the 'condition thereof being duly certified in open court, by the 'clerk of said court, and was duly received in the said county 'court,—as by the record of said recognizance and the con- 'dition thereof, now remaining in the said county court at 'Burlington, manifestly appears. And although the said 'John Williams was, by order of the said court, publicly 'called in said court, to make his personal appearance before 'said court, to answer to such matters and things as should 'be objected to him in that behalf, and although the said 'Jacob Rolfe and the said Henry Hand were, also, three 'times publicly called in, and by order of, said court, to have 'the said John Williams before the said court according to 'the condition of the recognizance, yet, the said John Wil- 'liams neglected to appear before the said court, and the 'said Jacob Rolfe and the said Hand refused to have the 'said John Williams before the said court, but suffered the 'said recognizance to become forfeited," &c.

The defendant demurred to the declaration, and judgment was rendered by the county court that the declaration was sufficient. The defendant excepted.

Lyman & Marsh, and *Charles D. Kasson* for defendant.

I. The recognizance is void for requiring more than the law. *Treasurer* v. *Seaver et al.* 7 Vt. R. 485. 7 Pick. R. 333. 9 Con. R. 350.

In taking the recognizance, the court were in the exercise

of their common law powers. There is no statute for such a case. If, therefore, the common law did not authorize the *condition*, the whole is void.

At common law the respondent was only bound to give bail for his appearance at the proper tribunal, or, at most, to appear and answer. H. P. C. book 2, cap. 15, sec. 2, 83, 84. 4 Bl. Com. 297. 1 Chit. Crim. L. (90) and (93) (105) 86. This requires him to *appear, remain from day to day and time to time, and abide the order and decree of the court in the premises, and not depart without leave of the court.*

If, at common law, (where the recognizance was simply to *appear and answer)* the prisoner *stood mute*, his sureties were *amerced;* and so the law stood until the statute of *Mailbridge*, cap. 28, provided a remedy. H. P. C. b. 2. cap. 15, 384. Thus clearly showing that a recognizance at *common law* was to be considered in the light of any other contract, so far as relates to its *construction.*

In the case of *Mather* v. *Clark*, 2 Aik. 210, which was a question arising on a bastardy recognizance under our statute, the court held that the *construction of the statute*, was such as to be answered by a mere appearance and surrender for trial. This would seem to be treating the words, "abide the order of court" &c. as surplusage and not meaning any thing.

But the construction of a statute, with a view to the end it sought, and that of a contract, at common law, are quite different things.

A case is not to be found where, at common law, a prisoner was ever required to find bail that he should be *whipt, imprisoned, pay a fine,* be *transported* or *hung*, if the court so ordered; nor are many statutes of that kind to be found; and what there are, it would seem, are virtually repealed, so far, by judicial construction; thus showing the indisposition of our courts to sustain a law so manifestly violating every constitution of this country and even the statute of Wm. and M. of England, protecting against *excessive bail.*

See *Mather* v. *Clark* above cited, where the court deem it, if construed as it apparently reads, *wholly unconstitutional.*

Will this court, then, sustain a condition, *imposed, confess-*

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edly, by *a judicial tribunal, which even our legislature could not enact within the pale of our constitution?*

It is true there cannot be found many cases, at common law, to show that an escape after sentence, or after conviction and before a full compliance with the sentence, would be a breach of such a condition, and the reason is obvious; for 1st. no common law court ever claimed the power; and 2d. if they did, and the condition was broken, no prosecuting attorney ever presumed that he could enforce such a void recognizance. The very absence of such a case proves the absence in the law of such a condition.

But we do find in the cases cited, that if there is more than a condition to *appear*, it must be *complied with*. This shows that, at common law, the terms of the condition, as regards its construction, are viewed in the light of a contract. *Queen* v. *Bidpath*, 10 Mod. R. 152. 1 Chit. Crim. L. 86. *Treasurer* v. *Woodward*, 7 Vt. R. 531.

II. There is a still more anomalous condition in this recognizance.

The object of every recognizance is to give the prisoner his liberty, until *some time certain*, when the court shall put him to plead.

Here it appears he was *arrested, and in the court, then in session*; and *in this state of affairs he was admitted* (or, rather, pretended to be admitted) to bail, *i. e., to his liberty.* And by the express terms of the condition, he became bound to "*remain*" where he was, "*at all times*"—"*from day to day*" *and* "*time to time*," "*and not depart without leave of court.*"

What did he get by such a recognizance,—entered into to keep him a prisoner?—sureties that he should continue to abide *in duress?* The very object of the whole proceeding *is liberty*, and by the very terms of the condition he forfeits it.

The court, having the prisoner in custody, have no right or power to demand that he shall procure sureties for his remaining so. He could not "*depart*" without *asking* "*leave of said court.*"

Again:—It is insisted that if he did get any liberty, lawfully, by such a condition, there should be some *time certain*, at which he was bound to appear. Both prisoner and sureties

were entitled to know at what time he would be required to answer.

If it be said he must "*remain*" *where he was*, then he took nothing by his recognizance; and if he need not "remain" but really took liberty as the lawful condition of his recognizance, then *a time* should have been prescribed, at which he should *appear*; otherwise this legal instrument, or record, is a mere trap to catch the unwary; and even the wisest could not escape the snare. The law abhors such things, and seeks to *protect* rather than *ensnare*. 1 Chit. Crim. L. 86 (105) 87 (106).

III. The remaining objection to the recognizance, is, that the parties were required to pledge not only their property of every kind, but "their *bodies*" to be taken in execution, in the teeth of the statute which *protects them from imprisonment on all contracts*.

If this recognisance was by them *voluntarily* entered into, it is, as it respects this statute a *contract*.

It is not a judgment, properly; (and it is understood that this court considers judgments, even, as within the purview of that act,) so that in any view of the case, the court had no right to demand a pledge of "*their bodies*." See 3 Maule and Sel. 1.

IV. It does not appear when or where the cognizors were called upon to produce Williams.

It is recited under a *licet sapius*, they were called "by order of the said court," *i. e. Chittenden county court*, to produce him, &c. but whether it was at that term, or some other term, before, or after; or, if at that term, whether before or after the recognizance, *does not appear*.

He should be bound to a *day certain*; but if he be called *at any other time*, the cognizors are entitled to notice of such intention, which they have not, in this case, had. 1 Chit. Crim. L. 87, (106).

Nor is it alleged that the prisoner was ever "called" except by way of recital, which is bad on general demurrer. This is a material, traversable fact, and should be *expressly averred*. *Balch* v. *Owen*, 5 T. R. 409. *Wallis* v. *Scott*, 1 Strange 88. *Birks* v. *Trippet*, 1 Saund. 33, note (2).

V. There is no sufficient *breach assigned*. The breach is that he *did not appear at the said court*, but it does not

CRITTENDEN, January, 1843.

appear, at what term, whether when he was called, or at what time he was called.

Treasurer of Vermont v. Rolfe.

H. Leavenworth, *State's Attorney*, for plaintiff.

I. The declaration in this case is in the usual form in writs of *scire facias*, and which has always been approved of, and adopted by the court. The objections that have been made are without the least foundation, and will so appear by reference to the declaration itself. The declaration, then, is sufficient authority in and of itself, on the face of it, to satisfy the court of its sufficiency.

II. The body of the defendant can be held on the recognizance as it is not a contract; and if that part is bad, it does not render the recognizance otherwise void. *Treasurer* v. *Woodward*, 7 Vt. R. 529.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This is a *scire facias* on a recognizance, entered into for one Williams, who was arrested and in custody on a warrant issued from the county court. The writ is demurred to, and brings in question, both the legality of the recognizance, and the sufficiency of the writ of *scire facias*. It appears from the writ that a bill of indictment was found by the grand jury, returned into court, a warrant issued thereon, and the respondent arrested; and that, being in custody, the defendant entered into the recognizance declared on.

No power is expressly given to the court, by statute, to take any recognizance in such a case, nor is any form prescribed; but it is undoubtedly incident to every court, having criminal jurisdiction, not only to bring the offender before them, but to take bail for his appearance, in such form, as shall secure the object intended, to wit, the appearance of the person accused, at all times, when requested. When the offender is brought before a magistrate, for examination, the magistrate is authorized by statute, to take bail for his *appearance* before the next county court. So when the person is in jail, a judge of the county or supreme court is authorized to take bail for the *appearance* of such person, before the county court.

It is to be noticed that these statute provisions, which

have been in existence for over half a century, require bail only for the personal appearance. A form of recognizance to be taken by the magistrate, was made and published by Judge Chipman as early as the year 1792, and has ever since been adopted, the condition of which is nearly in the words of the recognizance under consideration.

The same condition has been inserted, in all recognizances taken in court, or by a judge out of court, from that time to this; and we should be very reluctant, at this time, even to question, or doubt their validity. The object of taking bail is, to relieve the person from actual custody, and to secure his appearance whenever wanted either to plead, to take a trial, or to receive the judgment of the court.

The condition is fulfilled by the appearing of the person at any day, or at any time when called on, for that purpose, answering by plea, and submitting to hear the sentence of the court. Indeed, this subject appears to have been fully considered and determined in the case of the *State Treasurer* v. *Woodward*, 7 Vt. R. 529; and most of the questions which have here been argued were decided in that case. There appears to be no condition in this recognizance, contrary to the usual form, except *the condition to remain*; and this means nothing more than that he should be at all times, ready to appear and answer, when called for.

The breach is well assigned, in stating that the respondent did not appear though called; and it was not necessary to aver that the respondent and his bail were called and also that he did not appear. Notice of calling the bond was not necessary, as was determined in the case of the *Treasurer* v. *Woodward*; nor was it necessary, in the taking of the recognizance, as it was taken during the sitting of the court, to specify any day for his appearance, though the day of appearing should be mentioned if the recognizance be taken in vacation.

The writ and the recitals therein, are somewhat inartificially set forth; but as the recognizance appears to have been in the form long since established, and constantly used, and contains no other conditions except to secure the performance of the duty required of the person indicted; and is, moreover, sanctioned by the decision of this court, in the

CHITTENDEN, January, 1843.

Allen v. Adams & Allen.

cases before referred to, we adjudge the same to be sufficient. The judgment of the county court is, therefore, affirmed.

GEORGE A. ALLEN *v.* CHARLES ADAMS AND HEMAN ALLEN.

A debtor remaining upon the jail liberties, on a commitment on execution, is not liable for the interest accruing on the debt, if he pay the amount due on the execution at the time of commitment, before departing the liberties.

THIS was an action on a jail bond, executed to the plaintiff as sheriff of Chittenden county, founded on an execution against the defendant, Adams, on which he was committed on the 3d of June, 1833.

The defendants pleaded specially, that, on the 12th of March, 1834, Adams paid to the administrator of the creditor in said execution, a certain sum, and on the 4th of July, 1836, a certain other sum, which sums were accepted to apply on the judgment, and which amounted to the full sum of the damages and costs therein, and the price of the execution, and the officer's fees for commitment; and that these payments were made and accepted before the alleged escape of Adams.

To this plea there was a demurrer. The court adjudged the plea sufficient; to which decision the plaintiff excepted.

C. D. Kasson, for plaintiff.

It will be observed that the plea only alleges the payments were made to be *applied*, leaving the *mode* of application to the law.

If a judgment draws interest, the rule of this court prescribing the application of moneys, determines the question.

1. At common law, all contracts or obligations for the payment of money *at a day certain*, and also *judgments*, draw interest. This was payable at a *day certain*, to wit, as soon as rendered, or in 60 days thereafter. 2 Com. L. R. 207–8. 2 Burr. 1086–8, 1096–8.

Read v. *Rens. Glass Fac.* 3 Cow. R. 394. Where the court (Sutherland, J.) says the interest is always an *incident* to the debt; which is familiar law.

In *Tillotson* v. *Preston*, 3 J. R. 228, the court only held that, where the declaration did not disclose a claim carrying interest, a plea of payment of the amount *prima facie* due, was good on demurrer.

But here the case shows a demand carrying interest, and the plea does not allege a *satisfaction in fact.*

2. Whatever may have been the common law, we contend the statute of 1810, (Sla. Comp. L. 164) and the statute of 1822, (Sla. Comp. L. 216) together with the case of *Martin* v. *Kilbourne*, 11 Vt. R. 93, settle the question in this state.

If the judgment be merged in the jail bond, the case must fall within the act of 1810.

But we apprehend that it falls within the act of 1822, if either. That act extends to "*all judgments on which execution shall issue.*" This is such a case most certainly.

It directs all *officers to* "*collect interest after* 60 *days*," clearly referring to all those cases, where, by the commitment, or postponement of the sale of property, or other cause, the "collection" shall be delayed beyond that period.

Again:—The commitment of the debtor, raises no new relation between him and the creditor; but only between him and the sheriff. The creditor stands aloof, and allows the law to take its course.

It is a *means* in the sheriff's hands (possibly for the benefit of the creditor) to *enforce collection.*

The sheriff or *jailor is the* "*officer executing the process*," and this is only a *mode* of executing it. He is thus to *keep him until he pays*; and if he does not pay under 60 days, he has no right to let him off without interest, as in any other case of payment subsequent to the 60 days.

If the court can exempt him in this case, they may in all others, and so annul the statute.

Suppose the money had been *paid to the sheriff directly*, could he be justified in discharging him? certainly not; for he was at that very period "*executing*" *the process*, and was bound to *collect interest.*

If the payment to the creditor, who only receives it to be *applied legally*, can alter the case, it is for some reason too nice to perceive.

3. It is already holden that the commitment of the debtor

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is a mere *pledge* for the debt; we, therefore, cannot see how it should work a *satisfaction* at all; much less, *that precise quantity of satisfaction which is just equivalent to 6 per cent, per annum.*

This would be an uncertain guage of the value of a man's liberty, (if that were the ground on which it wrought satisfaction), as it would depend on the magnitude of the judgment.

If, then, it is not a satisfaction, it is *nothing.*

4. If it be contended that the condition of the bond, or execution be, that he shall remain until *those sums be paid,* and *therefore* the condition is complied with,—we answer, so is the direction and condition of all executions and jail bonds, whether upon *alias* or *pluries* executions, and still *they* carry interest. Interest is the *incident* which the law has annexed to these cases.

We cannot discover any rational distinction between this case and that of *Martin* v. *Kilbourne,* 11 Vt. R. 93.

C. Adams, for defendants.

In actions *ex contractu,* there are but three ways in which interest is demandable. 1st. As increase of damages for breach of contract. 2d. As given by the provisions of the law. 3d. Or as part of the contract.

In this case there can be no pretence that any thing was demandable as an increase of damages for breach of contract.

It was not demandable by any of the provisions of law then in force.

The law of 1822 gave interest on executions after 60 days; but the execution in this case issued and was executed, within the 60 days. Executions *executed* do not come within this law.

The sheriff having an execution is directed to collect the damages, cost, execution, and his fees, *particularly stated.*

The jailor is commanded to keep the debtor until he pay *the sums above named,* together with the jailor's fees. The particularity with which these are mentioned forbids the inference that any thing more is allowable, and there is nothing in any law warranting any further demand.

Before breach of the bond, the debtor, in contemplation

of law, is within the jail, and under the control of the jailor, and may be returned there, at the pleasure of the jailor. The bond is in the nature of an extension of the walls of the jail, and until breach, the rights of the creditor and liabilities of the debtor remain unchanged. The jailor may keep his debtor in the jail room or in the house attached to it, as he pleases, *without bond*; or he may keep him within the limits *on bond*; and, until a breach, he cannot be sued for an escape, nor be compelled to assign the bond.

Nothing can be demanded of the jailor, nor of the debtor, while in actual custody, beyond the sums for which he is committed *without interest*. It must be so, unless there is an express law requiring payment of interest. The judgment ascertains the amount, and the commitment is a manner of enforcing payment of it. It is the execution of the final process of the court.

No interest can be recovered on contracts, unless there is an agreement, express or implied, for the payment of it. *Haveland* v. *Bowerbank*, 1 Camp. 50. *Colton* v. *Bragg*, 15 East. 223. *Sellick* v. *French*, 1 Cow. R. 32. Com. Con. 387, (424).

The contract in this case being in writing, there can be no implied undertaking to pay interest; and if demandable, it must be by a fair construction of the contract, as written.

But there is no ground for any such construction. The terms of the bond are clear and unequivocal, for the payment of a certain, definite sum. The principle is applicable to all bonds, that the penalty can never be demanded while the conditions remain unbroken; and there is, and can be, no exception as to jail bonds.

The condition of the bond is prescribed by law, that the prisoner *shall remain in the limits until he be discharged*. This *discharge* is not the act of the creditor, but is the satisfaction to be made by the debtor. The plain rendering would be, that *the debtor shall remain in the limits until he satisfy the sums for which he is committed*. This must be so, unless an increased liability is raised by the act of giving the bond, for while in close jail, nothing can be demanded beyond the payment of the sums named in the execution, and fees.

After a breach, interest may be demandable, but on a dif-

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ferent ground altogether. By the breach, the penalty may be demanded and, on a motion to chancer, the court may allow interest as increase of the debt.

The opinion of the court was delivered by

REDFIELD J.—This is an action on jail bond. Plea that the debtor paid the damages, cost and fees, &c. before departing the liberties. Demurrer and joinder and judgment of the county court that the plea is sufficient.

The only question to be determined is, whether the creditor, under the circumstances, is entitled to interest upon the judgment. It is no doubt true, that, for a great number of years, in England, in actions of debt on judgment, the plaintiff has been considered entitled to recover interest in addition to the amount of the original judgment. The same has always been the law of this state. But at common law, and with us, unless aided by statutes, he could not, in any other mode of enforcing the judgment, recover such interest. If, for instance, he brought *scire facias*, instead of debt, or took out an alias execution after the date of the judgment, or committed the body of his debtor, who remained in jail, he must be content with the amount of his judgment simply. This difference in the amount the plaintiff realized in these different modes of enforcing his judgment, did not result from any inherent difference in the rights of the parties, but from the technical operation of different remedies. The *scire facias* only revived the original judgment; the officer could only collect the sum stated in his writ; the jailor was bound to release his prisoner on payment of the sums named in the precept, which was his warrant for detaining him, with, perhaps, additional prison charges.

In many of these cases the legislature has interfered, and enacted that interest shall be paid. On some cases of *scire facias*, and on executions collected by officers, interest has, at different times, been directed to be reckoned. Whether any such provision has been extended to the present case is now to be determined.

It is not pretended that such is the case, unless the act of November 10, 1822, extends to this case. In the case of *Martin* v. *Kilbourne*, 11 Vt. R. 93, we considered the act did extend to all cases where a judgment was enforced by

an execution put into the hands of an officer; but this only extended to the time of executing the process, and had no reference to what had been the state of the judgment before, or what should happen after the process was executed. And we now think that this statute had no reference to the computing of interest on judgments, except such as were in process of execution, and then only up to the time of execution. The terms of the statute clearly indicate this. "All judgments, on which execution shall issue, shall be on interest after sixty days, and any officer *executing the same* is hereby authorised to collect and account therefor." This clearly gives interest only upon such judgments as are in the process of execution, and then only up to the time of execution, to be computed by the officer. The most, then, that can be concluded, is that, up to the time of the commitment, interest, after sixty days, shall be computed. After that, the execution is no longer "executing," but *executed*.

The form of the writ of execution shows this. The jailor is required to keep the debtor, "until he pay the full sums above mentioned, *with your fees*,"—not with interest thereon, but the same sums, the officer might have demanded. Such, too, has been the uniform practice upon this subject. I could never find any one in active business at the time, who ever supposed the statute of 1822 affected cases of this kind; and contemporaneous exposition of statutes is of paramount weight. The fact that, if the debtor commit an escape, the creditor will recover interest, or that if the creditor release the debtor and take an alias execution, and thus bring the case within the statute of 1822, he will recover interest, no more shows he should recover it here, than the fact, that he is, and always was, entitled to interest in debt on judgment, shows he should equally have recovered it in *scire facias*, or on execution, even without the aid of the statute. It is enough for us to know that in this case the law has made no provision for adding the interest to the judgment after the commitment, and that *the debtor is entitled to his release upon paying the sums upon which he is committed*. For one to say, *ita lex scripta est*, is thought to be, I am aware, no very great work of profoundness in the exposition of the law; but it is an unanswerable reason, why decisions should not countervail the plain letter of the law. Judgment of county court affirmed.

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STATE *v.* G. H. FOX.

State v. Fox.

An indictment against an individual, unconnected with others, for aught that was averred, predicated upon that section of the statute relative to offences against public policy, which inflicts a penalty upon each individual of any company of players or persons whatever, who shall exhibit any tragedies, &c., is insufficient.

INFORMATION, in five counts, filed by the state's attorney, founded on the fifteenth section of the statute relating to offences against public policy, which declares, that if "any company of players or persons, whatever, shall exhibit any tragedies, comedies," &c. "in any public "theatre or elsewhere, for money," &c. "each person so "exhibiting, shall forfeit and pay a fine not exceeding two "hundred dollars."

The first count of the information charged "that G. H. Fox, of Burlington, in said county of Chittenden, on the 4th day of July, A. D. 1842, with force and arms, at Burlington, aforesaid, did exhibit comedies, farces and ludicrous compositions, to divers citizens of this state, for money, as a reward for his the said G. H. Fox's service and labor therein, contrary" &c.

The remaining counts varied the description of the offence, and charged the exhibition of a specific comedy, and the reception of money from individuals named; but omitted to charge the respondent with the commission of the acts complained of, as one of a "company of players or persons."

The respondent pleaded not guilty. The jury returned a verdict of guilty; and the respondent moved in arrest of judgment for the insufficiency of the information. The motion was overruled, and the respondent excepted.

J. Maeck for respondent.

That the respondent belonged, either to a company of players or a company of other persons exhibiting tragedies, &c., in a public place, with the intent to be rewarded for his services, and inviting, or suffering the public, generally, to witness the performance, is not charged in any of the counts of the indictment. But all these are essential ingredients to constitute the offence, and necessary to be

alleged and proved, before a conviction can be had under the statute. If a single individual, only, exhibits, it is not within the act. To render him so, the court must read the statute in this way: "*If any person shall,*" *&c.* wholly rejecting the word "company." But whether the individual does the act entirely alone, without any connexion with any others, or in connexion with others, is very material. In the first instance, it is not declared to be unlawful; in the other it is visited with heavy penalties. The true reading of the statute we insist is this—"If any company *of players or any company of other persons*, shall," &c. This accords best with the rules, both of grammar and construction of statutes. "A statute ought, upon the "whole, to be so construed that if it can be prevented, no "clause, sentence or word, shall be superfluous, void or "insignificant." 6 Bacon, 380, Wilson's Ed. 1 Shower, 108. *Rex* v. *Berchett*, Hard. 344. To give it the construction contended for by the prosecutor, the clause, "*if any com-*"*pany of players*," is wholly superfluous, and the word company will be rendered wholly void.

Again: On the same page of Bacon, citing 1 Inst. 381, for his authority, the rule is laid down, "that the most nat-"ural and genuine way of construing a statute is, to con-"strue one part by another part of the same statute." In various other sections of the same statute, when the act may be fully and effectually performed by a single individual, the legislature have attached a penalty to it, though no other one participated with him in the performance. This plainly shows they did not intend to make this offence penal, unless more than one was concerned in the commission. The motive of the legislature in impeding amusement and instruction to the people does not appear; and, as there is no preamble we cannot conjecture whether they had the morals of the people in view, or designed to regulate the currency or exchanges. If the latter, it is obvious that a single teacher of elocution, like the respondent, would do little damage to the treasury, while a complete travelling theatre might create a suspension. The one then would be a proper subject of prohibition; the other not.

But, to construe the statute so as to make the facts there charged, an offence under it, the court must dispense with

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another important rule, which ought always to be observed, in construing statutes, to wit: that penal statutes are construed strictly. In Plowden 17, *Regina* v. *Togasea*, 6 Bac. Ab. 390, the rule which is most peculiarly applicable to this case, is laid down thus—"The rules of the common law 'will not suffer the general words of a statute to be restrained 'ed to the prejudice of a person upon whom a penalty is 'inflicted. But there are a multitude of cases to show, that 'the general words of a statute ought to be restrained, in 'favor of such person."

H. Leavenworth, State's Attorney, for plaintiff.

1. The expression in the statute—"Any company of players or persons whatever"—evidently means a company or a person, and not company of players or company of persons. That is, if a company of players, or if an individual, shall exhibit theatrical shows, &c. they shall suffer the penalty of the statute—the word persons, by construction, meaning the same as person. Hence all the counts in the indictment are sufficient in alleging that the respondent exhibited theatrical shows.

2. The language of the statute is the most concise possible. It consists of words most ordinarily used; and it would have been unnecessary to have used any more or other words. The framers adopted a correct rule in using as few words as possible to express their intention.

3. To connect the word company with the word person would be a repetition, for the word company refers to persons when used in connection with the word players. A company of players is nothing more, of course, than a company of persons; and if the statute was designed only to punish those persons who were connected with companies, then the expression company of players would have been sufficient. But the framers of the statute, after they had used the expression "company of players," saw it would not comprehend those individuals who might exhibit theatrical shows, and they added the common expression, "or persons whatever;" which in fact is the same as if they had said, any person or persons whatever.

4. The expression, "each person so exhibiting," in the last part of the section, further supports the construction

contended for. The expression, "each person," refers to individuals who exhibit, who are not connected with companies, as well as those that are.

5. The framers of the statute must have had in their minds those individuals who exhibit theatrical plays, who were not connected with companies, as well as those who were. It would be contrary to reason and common sense to conclude otherwise; and having in their minds both classes of persons, they have most evidently comprehended both in the statute.

6. Though penal statutes should be construed strictly, yet they should not be construed so strictly as to defeat the obvious intention of the legislature. *United States* v. *Wiltbergen*, 5 Wheaton's R. 76.

The opinion of the court was delivered by

BENNETT, J.—This case comes before the court upon a motion in arrest, for the insufficiency of the information. It is one of the first principles relative to indictments that they must contain such facts and circumstances, as are necessary to constitute the offence. Several objections are made to this information; but it is of no importance to consider but a single one. The 15th section of the statute relative to offences against public policy, page 448, upon which this information is founded, provides, "that if any company of players, or persons, whatever, shall exhibit any tragedies, &c. in any public theatre or elsewhere, for money, &c., each person so exhibiting, shall forfeit and pay a fine not exceeding two hundred dollars. In none of the counts in this indictment is it alleged that Fox was one of a company of players or persons; and to my mind it is quite clear that no single individual, unconnected with others, can commit the offence contemplated in this section of the statute. The evils intended to be prevented by this statute, arose from a company of players, or of persons professing to act as such, going about the state and getting up their various exhibitions; and not from the acts of individuals.

Besides, the obvious grammatical construction is for the word "persons" to stand connected with "players;" both in the same case; and the one extending, as the case might be, to individuals, not, perhaps, included in the other.

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The penalty is inflicted "upon each person so exhibiting." All penal statutes are to be construed strictly; and general words are not to be restrained, to the prejudice of a person upon whom a penalty is inflicted; though they will be restrained in favor of such person. In the county court I was of the opinion that the indictment was bad; but we thought best to overrule the motion, that the question might pass to the supreme court. The result is, that the judgment of the county court is reversed, and the sentence of the court arrested.

JOHN WHEELER *v.* HYMAN LANE.

The second section of the act of the 10th of November, 1802, exempting from taxation the property of the President and Professors of the University of Vermont, to the value of one thousand dollars, is in force, and not repealed.

TRESPASS for taking a cow. Plea, not guilty.

Issue to the court.

The cause was submitted to the county court, upon the following statement of facts, agreed upon by the parties, to wit:

"In this cause, it is agreed, that John Wheeler, at the 'several times hereafter named, was, and is, President of 'Vermont University; that Hyman Lane was, and is, Con-'stable and collector of taxes, in and for the town of Burling-'ton; that, on the first of April, 1840, the plaintiff owned 'and possessed one cow, of the value of $25, one horse, of 'the value of $75, and stock of the Bank of Burlington, of 'the value of $1000,—amounting, in the whole, to the sum 'of $1100,—and no other taxable property; that his list for 'that year was

'One poll, - - - - - - -	$10.00
'One cow, - - - - - - -	1.25
'One horse, - - - - - - -	3.00
'Bank stock, - - - - - - -	60.00
'Making his list for 1840, - - -	$74.25;

'and that the plaintiff delivered no list to the listers, but was 'assessed by them as above:—

'That the town of Burlington, in town meeting assembled, 'on the 8th of March, 1841, voted a tax of seven cents on

'the dollar of the grand list of 1840; on which a rate-bill 'was regularly made, assessing said Wheeler, at the sum of '$2.47, and delivered to said Lane to collect, with a regular 'warrant to collect the same; and that, by virtue of said 'rate-bill and warrant, on the refusal of President Wheeler 'to pay said tax, the defendant, Lane, took his cow, and 'regularly sold her in satisfaction of said tax:—

'That the funds of the University consist, chiefly, of the 'lands reserved for that purpose, in the grants by the state; 'but that considerable donations, in lands, money and books, 'have been made to the University, by private individuals.

'The several acts of the General Assembly of Vermont, 'relating to the University, are made part of the case.

'If President Wheeler is liable, under the laws of this 'State, to the payment of said tax, judgment is to be enter-'ed for defendant to recover his costs; but if he is, by law, 'exempted from the payment of said tax, then judgment to 'be entered for the plaintiffs, for $15 damages.

'The only question which the parties wish to raise, is, the 'liability of the President of the University to the payment 'of taxes; therefore all matters of form are to be disregarded; 'and if the case stated is not sufficient to raise that question, 'then the parties agree to amend it."

Upon this statement, the court decided that the defendant was guilty, and rendered judgment for the plaintiff to recover the damages stipulated in the agreement, and his costs;—to which decision the defendant excepted.

C. Adams, for defendant.

The act of 1779 provides that all males between 16 and 60 shall be set in the list at six pounds, excepting ministers of the gospel, the president of the college, annual school masters, and students; and that *all* the estate of ministers and the president shall be exempt from taxation. State Papers, 279.

Act of 1787. Males between 21 and 60 are subject &c., excepting as above; but the amount of property of ministers and president exempted, is limited to five hundred pounds. Page 10.

Act of 1791, founding a college at Burlington, exempts all the property of the University, to the amount of one hun-

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dred thousand pounds; and the persons of the officers, students, and servants, are exempted from taxes and military duties.

Act of 1797, provides that all males between 21 and 60 shall be set in the list at twenty dollars, except ministers and students, and exempts the property of ministers to the amount of one thousand dollars.

Act of 1802. The persons, families and estates, to the amount of one thousand dollars, of the president and professors in the University, and the persons of the students, resident graduates, and servants, are exempted from taxes and military duties.

Act of 1819, repeals all exemptions in favor of the property of ministers.

Act of 1825. All persons are set in the list, except students, and there is no exemption of property, except land for schools and other public, pious and charitable uses; and all other acts are repealed, *in pari materia.*

From this view of the several acts, it is apparent that the legislature have repealed all exemptions in favor of college officers, and have subjected all male persons to taxation, excepting students.

The only question is, then, whether the legislature has power to annul these exemptions in favor of college officers. The only ground on which the annulling can be resisted, is, that the acts creating these exemptions operate as grants, thereby creating vested rights.

The act of 1802 is not a grant to any one, although corporate powers created by law, and vested in the University, are, by virtue of the act of 1791; and if any act is to be considered as a grant, it is this act of 1791. The act of 1802 is not in the nature of a grant—creates no vested rights, and is but the ordinary legislation of the state, exempting, or subjecting, as sound policy may dictate.

It rests on the basis of exemption from the levy of execution, of cavalry horses, and of militia polls, which are varied from year to year. These exemptions create no permanent rights, any more than the bounty on silk or wolves—laws which confer privileges while the laws exist, but which may be repealed at the pleasure of the legislature.

By the existing laws, all males over sixty years, and all

females, are exempted; but no one ever supposed they acquired thereby any vested rights, nor doubted the power of the legislature to subject them to taxation. The policy of such laws might well be doubted; but there can be no doubt as to the power of enacting them.

Neither the act of 1791 nor of 1802 create any rights, or confer any privileges, beyond the existence of the laws.

Before the establishment of the college, by the act of 1779, the president and ministers of the gospel were alike exempted from taxation; and if these exemptions can be regarded as vested rights, they became so by the law of 1779, as much as by the act of 1791, or 1802; and yet, the power of the legislature to repeal these exemptions in favor of ministers, has never been questioned. It will be difficult to draw any distinction between the rights of ministers and college officers, and limit the power of the legislature as to one, and leave it uncontrolled as to the other. Both classes are equally meritorious, and if one need protection more than the other, assuredly the ministers are entitled to it.

The college officers can claim no superior rights from the fact that the act granting these exemptions creates the corporation, and authorizes them to take the charge and management of the funds of the institution.

The officers are not parties to the grant; and it is not seen how those who are not parties can avail themselves of its provisions. It will hardly be contended that the students, resident graduates, and servants attached to the college have acquired any vested rights from the act of incorporation, for the very obvious reason that it is not a grant to them; and yet the language is as strong in their favor as in favor of the officers.

If any rights were created by the act of incorporation, they are rights vested in the trustees, for they only can be regarded as the grantees; and the provisions therein, in favor of all others, as well the officers as the students and servants, are but part of the ordinary legislation of the state, which may be varied, from time to time, as the legislature may think expedient.

Whatever character the exemptions assume, they cannot be considered as personal and several rights, to be exercised by each, severally, but joint, and to be exercised by them

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collectively. Take the case of trustees. If they have any rights, awarded to them, they are joint rights, to be exercised by them collectively, in their corporate capacity of trustees.

If there are any rights created, they are in the nature of a franchise, and can only be exercised by the trustees, collectively, when assembled as a corporation. It would be a novel idea that the servants attached to the institution, have rights vested in them, severally, while the trustees to whom the grant is made, have none.

The argument for these exemptions rests on the supposition, that the corporation of the university is a private corporation. It may be admitted that an act establishing a bank, a manufacturing company, or any other strictly private corporation, is in the nature of a grant, and that the trustees thereby acquire rights vested in them by the act, which the legislature have no power to repeal.

It is equally clear that a public corporation, as a town, county, or a bank, established by the government, on its own funds, and for its own facilities, is subject to the control of the government, and may be repealed at pleasure.

It was on this distinction that the Dartmouth college case was decided. In that case, *all* the funds of the institution were provided by the trustees, or through their agency.

The court held that the character of the funds gave character to the corporation created to manage those funds; and the reasoning that led the court, in that case, to decide that the corporation was a private one, would have led them to decide that the corporation of the University of Vermont is a public one.

This corporation has all the attributes that a public corporation can have. It has its foundation in the beneficence of the state; is endowed by the public lands of the state, and the trustees are appointed to manage the funds of the state. By the act of 1810, they were to be commissioned by the governor, as state officers, and, at one time, were to be appointed yearly by the legislature, as state officers.

The governor and speaker of the house are, *ex officio*, members of the board of trustees, and the corporation are required to make an annual report to the legislature of the state, of their funds and of the condition of the University. The University is declared to be under the special patronage

of the state; it is, in character, and effect, a state institution; its trustees are the servants of the state—stewards of the public beneficence, for the public good of the state; and the legislature have, from time to time, altered the charter as they considered the public good required.

There is a further consideration that should have great weight. By the terms of the last act, relating to the college (1828) the legislature have expressly reserved to themselves the right of repealing the act; and if the legislature have the power of repealing the *whole* act, *a fortiori*, they may repeal a part of it; and having, by the act of 1825, made provisions inconsistent with the exemptions in the act relating to the college, these exemptions must be considered as annulled.

The act of 1825 should have a liberal construction, inasmuch as it is founded in an equality of burthens. There is no good reason why the President of the college should be exempted from taxes to which all others are subjected. If his salary is not a sufficient compensation for his services, let it be increased. The people of this state would hardly be willing to pay the amount of the officers' salaries by a yearly tax; and yet this exemption, as far as it extends, is identical with a tax. There is a material difference in the mode of making an addition to his salary. In the one case it is a charge on the funds set apart for the purpose; but, in the other, is an addition to the individual burthens of the people.

The policy of state legislation has been constantly tending to an equality of burthens. At first, exemptions were liberally granted; but the legislature seems to have struggled for a more equal distribution, until, at length, all are subjected to common burthens.

All distinctions are particularly odious to the people of this state. It is on this ground they have abolished all exemptions in favor of ministers. And it is to be presumed that the repeal of the exemptions of college officers was on the same principle.

Lyman & Marsh for plaintiff.

I. The exemption of the President and other officers of the University from taxation, by the act of 1802,—Sla. Comp. L. 586,—is in the nature of a grant to the corporation; and the legislature has not the power to repeal it.

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1. The act of 1802 is an addition to the original charter, and, therefore, to all intents and purposes, a part of it; subject to the same rules of construction, and conferring rights and immunities equally sacred and binding upon the government, as the franchises vested by the act of incorporation. 3 Story on the Constitution, 262.

2. The corporation, created by the act of 1791—Sla. Comp. L. 581—and the several additional acts, is a private corporation, and, therefore, all legislative grants to it, whether of funds or franchises, are irrevocable. *Dartmouth College* v. *Woodward*, 4 Wheat. 518. 4 Cond. R. 519, 526, 562. *Allen* v. *McKeen*, 8, 9, 10, 11. 3 Story on Cons. 260, 262. *Trustees Caledonia Co. Gram. Sch'l* v. *Burt*, 11 Vt. R. 632.

3. And even though it be a public corporation, yet a grant of this nature is irrepealable. 2 Kent's Com. 275.

4. The exemption from taxation, secured by the act of 1802, though enuring to the benefit of certain officers of the University, is a grant of a right, valuable to the corporation, because it amounts to a contract on the part of the legislature to contribute to the salaries of those officers a sum equal to their respective taxes; and thus enables the corporation to reduce the salaries, by a corresponding amount.

II. The legislature has never attempted to repeal the act of 1802.

1. It was not repealed by any specific act,—by the general repealing act of 1839, or by the repealing clause of the listing act of 1825, now in force.

2. Nor does the last mentioned clause repeal it by implication, because the operation of that clause is confined to "acts and parts of acts, ascertaining the principles on which 'the list of this state shall be made, and directing listers in 'their office and duty." This is the uniform title of all the laws passed on the subject of the general list, from 1797 to 1825; and the legislature undoubtedly referred only to the acts bearing this common title; and it is a well established principle, that, if a particular thing be given, or limited, by a preceding statute, it shall not be taken away, or altered, by the general words of a subsequent one.

III. The exemption from taxation to the amount of $1000, refers not to the actual value of the property, but to the sum at which the property should be set in the list, by the listing law then in force.

The opinion of the court was delivered by

HEBARD, J.—Two questions are involved in this case. The first is, in relation to the *power* of the legislature to repeal that section of the statute of 1802, which exempts the property of the officers and students of the University of Vermont from taxation.

The other is, in relation to the fact whether, in case the legislature possesses that power, it has been exercised.

The last inquiry, if settled one way, settles the whole case, as it is unimportant, for the purposes of this trial, what powers the legislature possesses, if those powers have not been exercised.

The fifth section of the act of 1791, founding the University of Vermont, provides that "the persons of all officers, servants and students, belonging to said University, shall, during their continuance there, be exempted from taxes and military duties."

The second section of the act of 1802, which is "in addition to, and in explanation of," the act of 1791, among other things, provides, "that the persons, families, and estates of the president and professors, lying and being in the town of Burlington, to the value of one thousand dollars to each of said officers, shall be freed and exempted from all rates, taxes, military services, working at highways, or other such like duties and services."

If this last provision of the law is now in force, the judgment of the county court is corfect; for, although this section only exempts property to the value of one thousand dollars, still, if the tax is, in part, made upon property exempt by law, the whole tax is void. The important inquiry, then, is, has the legislature, by any subsequent enactment, taken away this exemption? The usual way of repealing a statute, is to pass a law for that purpose, expressly taking away the provisions of the previous law. But it is, sometimes, done by passing a law inconsistent with the provisions of the previous law; but this would usually happen only when the subsequent law was in relation to the same subject matter as the previous law. The act in which this exemption is contained, is in relation to the "founding of a University at Burlington." The subsequent laws, which, it is insisted, operate to repeal this, are the general laws of

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the state, "defining the principles upon which the grand list shall be made," and have not, directly or indirectly, any connection with this law, and make no allusion to it, in any of its provisions.

The act of 1791 and the act of 1802 are in relation to the same subject matter, and, consequently, whatever there is in the former, inconsistent with the provisions of the latter, is thereby repealed.

The exemption in the first act extends to all the taxes of the officers belonging to the University. The subsequent act of 1802 does not, in express terms, repeal the 5th section of the former act, but it contains a provision in relation to the same subject matter, which is inconsistent with it, and, therefore, the legal effect is, to repeal it. Instead of exempting the officers of the University from all taxes, it only exempts them from paying taxes on property to the value of one thousand dollars. But as there is no subsequent act on the same subject, which interferes with this exemption, it is reasonable to conclude, that the legislature have never intended to repeal or modify this section of the act of 1802. We think that such is not the legal effect of any of the general laws on the subject of taxation.

As this conclusion disposes of all there is in this case, we do not find it necessary to pass upon the other question.

The judgment of county court is affirmed.

CALVIN CARPENTER and CHAUNCEY BUEL *v.* WILLIAM P. BRIGGS and DAVID FRENCH.

A plea in bar to part of a declaration or count is good, if it is a good answer to all which it professes to answer, although it does not answer the whole declaration.

According to the practice in this state, that part of the declaration to which there is no answer is confessed, and judgment will be entered accordingly, at the proper time.

THIS was an action on a jail bond, given upon a commitment of the defendant, Briggs, on an execution issued on a judgment in favor of the plaintiffs against him, rendered in March, 1840. The defendants pleaded in bar, as to the

sum of $48.18, that on the 17th of July 1838, the defendant, Briggs, paid to the plaintiffs the said sum of $48.18, parcel of the debt in the plaintiff's declaration mentioned, which was accepted by the plaintiffs.

And for further plea in bar as to the said sum of $48.18, the defendants alleged that the said judgment was recovered against Briggs in an action of *scire facias* upon his recognizance, as surety for costs to the plaintiffs in a suit against them in favor of one Zerah Downer, wherein the plaintiffs recovered a judgment for $96.36 costs, in March, 1838; and that, after the recovery of said judgment, to wit, on the 17th of July, 1838, Briggs paid to the plaintiffs the said sum of $48.18, parcel of said judgment, which was accepted by the plaintiffs thereon.

To these pleas there was a demurrer; and judgment was rendered by the county court that the pleas were insufficient, to which judgment the defendants excepted.

W. P. Briggs and *Hyde & Peck* for defendants.

1. The first plea alleges payment of $48.18, parcel of the debt in the declaration mentioned. The time alleged in the plea is not material; as, under this allegation, defendant might show payment on any day prior to the commencement of the action; and as the plea is pleaded to part, and the body of the plea is an answer to such part, the plea is good, *pro tanto*.

The object of pleading is to notify the parties, each, of the claim or defence of his adversary, and narrow down the case to the real controversy, and thus prevent surprise and cheapen the trial. Payment of the whole debt *must* be pleaded, to prevent surprise to the plaintiff. The mischief would be the same to allow defendant to mitigate the recovery to a dollar or a cent, without plea or notice to plaintiff. Defendant must have some opportunity to show partial payment, and it is most beneficial to plaintiff that it be shown by plea. If defendant is compelled, in such case, to plead full payment, it might lead to an expensive trial, when, in truth, there is no controversy between the parties. No rule of pleading requires a party to plead a falsehood, as truth is an element of good pleading. Chit. Pl. 509. *Penton* v. *Robart*, 2 East, 88.

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A plea, which answers all it professes to answer, is good. The numerous cases in which the plea is pleaded to the whole declaration, and is but an answer to part, or is pleaded to part and is an answer to the whole, have no bearing on this question. There is another class of cases where the plea professes to be pleaded to part, but, in truth, goes to the whole *subject matter* of the suit, as in the instance given by Gould, (Gould's Pl., p. 363, sec. 105,) where the declaration was for goods delivered to be *kept*, and *carried*, the plea going only to the obligation to *keep*, and left the obligation to carry unanswered; yet it embraced the whole *property* in the declaration. In this, and the other cases of this class, the plea is a *partial* answer to the whole *subject matter*, and not a *complete* answer to a *part*. In the present case, the plea is a complete answer to a part of the subject matter; that is, the judgment. The rule requiring an answer to the whole declaration, is confined to cases where the plea is in justification, excuse, or denial of the original cause of action. Such seem to be the cases. Hence it is concluded that the rule never applies where the plea admits the cause of action, and rests upon subsequent matter in discharge. The plaintiffs, by accepting part payment, have, by their own act, made their cause of action divisible, for the purpose of defence. This case is the same as a plea, answering the whole of one of two, or more counts.

2. If this case comes within the rule requiring the defendant to answer the whole declaration, the plaintiff, by demurring, has discontinued the whole action. The plaintiff can take advantage of this rule only by refusing to accept the plea, and taking judgment as by *nil dicit* for want of a plea. A demurrer, or pleading over, discontinues the action. On demurrer, such plea stands on its own intrinsic merits, and the court cannot look beyond the particular plea, to see whether any other plea answers the residue of the declaration. The reason of this mode of exception is obvious; for it is conceded by all the books that a single plea need not answer the whole of the counts; but one plea may be pleaded to a part and another to the residue. One may terminate in demurrer, and the other in an issue of fact; and as, on demurrer, each plea stands on its own intrinsic merits, unaided and unprejudiced by another, and as the court cannot look

beyond the particular plea, to see whether any other plea answers the residue of the count or declaration, it follows, if such plea is good, in connexion with another answering the residue (which may be traversed) it is good *on demurrer* for so much as it professes to answer, and in truth does answer. In such case, the objection is not to the *sufficiency* but to the *regularity* of the plea. It is unreasonable to deprive the defendant of the benefit of the truth because he is unwilling to couple it with falsehood. If the plaintiff insists on a technical rule, against the justice of the case, he must comply with its requirements, or take the consequences. 2 Jac. L. D. 284. 1 Salk. 180. 5 Bac. Abr. 475. *Tippet* v. *May*, 1 Bos. & Pul. 411. Gould's Pl. 361, sec. 102, 103, p. 363, sec. 105. Arch. Pl. 174, (second Am. from last Lond. ed.) 1 Saund. R. 28, (n. 3). Chit. Pl. 509. *Hallett* v. *Holmes*, *per* Spencer, C. J., 18 Johns. R. 28. *Bullythorpe* v. *Turner* was a demurrer to a traverse of an immaterial averment, in an entire plea. The plea was *cepit in alio loco*, which is an answer in replevin, the place being material in that action. It professed to answer the whole plea, and prayed judgment of the whole action. In *Sterling* v. *Sherwood*, 20 Johns. R. 206, how the plea commenced does not appear, but it prayed judgment of the whole action, which made it a plea to the whole; and it was demurred to specially, for not answering all that it *assumed to answer*.

J. Maeck, for plaintiffs.

1. The payment plead was not a payment made, either on the bond, or on the judgment on which the bond was taken, but was made anterior to the rendition of the judgment. When the judgment was rendered on the recognizance, the defendant should have offered it in evidence, either as part payment or in mitigation of damages; and if he neglected so to do, he never afterwards can recover it, either by suit or plea in offset. *Corey* v. *Gale*, 13 Vt. R. 641, and cases there cited.

2. The pleas are bad, as they do not answer the whole cause of action. This rule requires no authority at this day.

3. Where the plea is defective in this particular, as in all other cases of pleading, deficient in substance, the proper course is to demur. Chitty, 574, says, " wherever the ad-

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'versary's plea is defective in form or substance, a demurrer 'is proper."

It was not made a ground of objection below, but possibly may be now, that, as the pleas did not begin only as an answer to part, and were in fact but an answer to part of the declaration, the proper course of the plaintiff was, not to demur, but to take judgment for the part unanswered, by *nil dicit*; and that if the plaintiff demurs, or pleads over, he discontinues his whole action. Chitty, 454, so lays down the rule.

But on this point there is much conflicting authority in England. In *Bullythorpe* v. *Turner*, Willes' R. 475, 480; Yelvt. 38; Cro. Jac. 27; Cro. Eliz. 434, and 2 Vent. 193, it was ruled that the proper course for the party was to demur; and none of the cases hold that where there is another plea covering the whole complaint, the action can be discontinued by demurring or answering over. It is mere matter of practice and form, a mere technicality, if the action is to be discontinued by the party's demurring; and the better and more sensible rule would be, to hold, as was said by the court in *Marvin* v. *Wilkins*, 1 Aikens, 111, that a demurrer is always a good answer to an insufficient plea. Such a rule is founded on sound principles well understood; and why should it not be applied to all cases where the pleading is insufficient. The rule, as laid down by Mr. Chitty, is merely technical, and serves no valuable purpose. The valuable rules of special pleading are already numerous; those which are mere traps, a wise administration of justice will discard, or refuse to naturalize. But the rule as laid down by Chitty has been denied to be law by high authority here. In *Sterling* v. *Sherwood*, 20 Johnson, 204, Chief Justice Spencer, speaking of the rule as laid down by Chitty and Sargeant Williams, says, "It appears to me it is not 'law, and that the cases they refer to do not bear out the 'proposition. On the contrary there are several cases which 'are directly opposed to it. In *Riggs* v. *Denistan*, 3 John-'son's Cases, 205, Kent, Justice, lays down the rule thus: 'That, as the plea did not, either by denying or justifying, 'meet the whole matter or gravamen, contained in the count, 'it was for that reason, bad; and he referred to 2 Vent. 193; 'Cro. Jac. 27; Cro. Eliz. 434. It does not expressly appear

'by the case, whether the plea professed to answer the whole 'declaration or not but I infer that it did not, or else that 'would have been relied on, in the opinion delivered. This 'question is very fully discussed by Willes, Ch. J. in *Bully-* '*thorpe* v. *Turner*, Willes' R. 475, 480. He reviews all 'the cases then extant, and has pronounced it absurd to say 'that the defendant could discontinue the plaintiff's action 'by putting in a defective plea.' He observed, 'if he 'demur, it is said he discontinues his own suit, for he ought 'to have entered up judgment by *nil dicit*, considering it no 'plea at all; but this, I think, is a practice that ought not 'to be encouraged, for it is saying the plaintiff may judge 'for himself without submitting his case to the judgment of 'the court. If indeed there were no plea at all, the plain- 'tiff might enter up such judgment, but if there be, in fact, 'a plea, though a defective one, I think that, in all cases, 'he ought to pray the opinion of the court, which he can do 'no otherwise than by demurring; and not to judge for 'himself.' He cited Yelverton, 38, and Cro. Jac. 27. The 'case in Yelverton was decided, finally, on a writ of error 'in the King's Bench, from the common pleas. The cases 'cited justify the decision in Willes, and it seems to me the 'reasoning is sound and conclusive."

In the subsequent cases of *Hickock* v. *Cootes*, 2 Wendell, 420; *Underwood* v. *Campbell*, 13 Wendell, 78; *Slocum* v. *Despard*, 8 Wend. 615, and *Etheridge* v. *Osborne*, 12 Wend. 403, precisely the same point arose, and the decision in 20 Johnson, above cited, was sustained.

It is well remarked by Chief Justice Willes that it is a dangerous practice to permit the party to be his own judge, and ought not to be encouraged; that he ought to pray the opinion of the court, &c., which he can only do by demurrer. It may be remarked that the English practice is not adopted here, of permitting the party to sign judgment himself, when he conceives the opposite party has been guilty of a default; but he must pray the court for his judgment. This fortifies the position we contend for, for how can the court decide the pleadings bad, unless the party asks their opinion by demurrer.

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The opinion of the court was delivered by

REDFIELD, J.—In this case, there are two pleas of part payment, both of which are not sufficient to cover the entire declaration. To these pleas the plaintiffs demur. The refinements in the English books, in regard to pleas in bar, which go only to a part of the declaration, leaving a portion unanswered, are nice to a degree which renders some of them not very intelligible. It seems to be admitted by the writers upon this subject, both English and American, that the rule in Westminster Hall is, that if the plaintiff demur to such pleas, he thereby discontinues his action. He should take judgment as by *nil dicit*, treating the plea as no plea at all. 1 Chit. Pl. 511. Gould's Pl. 363. This view of the subject is denied in the state of New York, ever to have been the doctrine of the common law. *Sterling* v. *Sherwood*, 20 Johns. R. 204. *Hicock* v. *Coates*, 2 Wend. 419. *Slocum* v. *Despard*, 8 Wend. 615. It is there affirmed that a demurrer is the proper answer to such a plea, where the objection is, that it is defective, or insufficient. Ch. J. Willes asserts the same doctrine in *Bullythorpe* v. *Turner*, Willes' R. 475–80; and cites Yelverton 38; *Hughs* v. *Philips*, and *Thomel* v. *Lopeld*, Cro. Jac. 27; neither of which, to my mind, seem to throw much light upon the subject. In *Edwards* v. *White*, 12 Conn. 28, the rule is admitted to be, in England, as laid down by Chitty, above; but it is said it has never been adopted in Connecticut. A further qualification is there stated to the English rule, as laid down in *Clarkson* v. *Lawson*, 19 Eng. C. L. 169, that such plea is good, if there be upon the record some other plea, which answers the whole declaration; but unless that be the case, such plea is technically bad. Such plea is also held to be bad, both in New York and Connecticut. Now this is surely too refined for common use, if not for common apprehension. The party may suffer judgment on the whole count by *nil dicit*; he may suffer judgment on a part of the count by default, and plead the general issue to the remainder. *Penton* v. *Robart*, 2 East's R. 88. He may confess a part of the count, plead a tender to a part, payment of a part, and non assumpsit to the residue. Chit. Pl. 51. Gould's Pl. 361–2. But if he plead to *part* of the declaration, although his plea profess to answer *only that part*, which it does answer, and *answer*

well, still, if he leave a portion of the declaration, neither answered nor confessed, the plea is bad for the whole; it is as no plea, and it cannot be demurred to, but the party must take judgment by *nil dicit*. But if there be one plea upon the record, which covers the whole declaration, then the party may plead as many part defences as he will. This is the English law. The same rule obtains in New York and Connecticut, except that in these latter states advantage of the defect may be taken by demurrer.

The courts in New York and Connecticut have advanced one step towards making this rule reasonable and tolerable; the one, by denying an absurd doctrine of the common law ever to have existed, and the other, with more independence, denying, that it had ever been adopted in that state.

We adopt the English rule as it exists at present, with two qualifications, that, under our rules of pleading, every portion of the declaration, which is not *answered* is *admitted*, and that the defendant may plead to part of one count, as well when there is *no general*, or *full answer* to the declaration upon the record, as *when there is*. Pleas to a part of the declaration, or to a part of a count, have been constantly received, in our practice, and their validity tested upon demurrer, without any question being made of the propriety of this mode of trial. *Torrey* v. *Field*, 10 Vt. R. 353. And at this late day, to go back and attempt to dig up an absurd refinement of the seventeenth century, in regard to which, such men as Chief Justice Spencer and Judge Gould are in exact contradiction; and to say, at the same time, that an answer to part of a declaration is to be regarded as nothing, because the party did not say he had no answer to make to the *remainder* of the declaration, when, by our rules of practice, had he interposed no plea, his silence must have been so construed as to the *whole* count or declaration, is, we think, pushing the matter of special pleading, (which is, in the main, a useful and improving study,) into some of those subtleties, which make it obnoxious to the severe reprobation of the unprofessional, and render it an instrument of entanglement and mystification, rather than a means of simplifying and abridging the sometimes involved and tortuous processes of judicial investigation. We wish to *preserve* the system to a reasonable extent; and in order to do this, it be-

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comes important, that we should not adopt a subtlety, which Mr. Justice Gould, in his very lucid treatise on pleading, after two pages of elucidation, (363–4), to my apprehension leaves darker than when he stated the naked proposition. The only *rationale* of such a rule is, that it is so, because it was so established, two hundred years ago; and that it is better now to adhere to it, than to introduce confusion by adopting a new one. With us, that argument is entirely in favor of the rule we here establish or rather *declare*, for, in practice, it has been established many years.

These pleas are to be considered, then. The second is admitted to be bad, as being a payment alleged to have been made to the plaintiffs before the rendition of the judgment upon which the jail bond was given, which is now in suit. The first plea is payment generally, and although the time alleged is anterior to the date of the judgment, it was not thereby incumbent upon the defendants to have proved their payment on the day alleged, but they might have proved it at any time after the judgment. This plea is, therefore, good for so much as it professes to answer. The judgment of the county court is, therefore, reversed, and judgment that the plea is sufficient, and that the plaintiffs be barred of so much of their claim, and that they recover the balance, with costs, deducting therefrom the defendant's costs of this court.

HICKOK & CATLIN v. SAMUEL RIDLEY.

Where money is advanced to the defendant, under an expectation that it will be paid in transportation, thereafter to be done, and to be adjusted upon the defendant's rendering his account, it furnishes a substantive ground of recovery in the book action, if not paid as the parties contemplated.

The continuance of a cause before an auditor is matter of discretion; and, the county court having accepted the report, and rendered judgment thereon, the party is concluded — the matter resting in the discretion of the court, and not being a matter of error.

THIS was an action of book account. Judgment to account was rendered in the county court, and auditors appointed; who reported, "That on the 23d day of May, 1842, 'the plaintiffs and their attorney, D. A. Smalley, appeared, 'and the defendant's attorney, Mr. Stansbury, also appeared, 'and moved a continuance, on the ground that the defend-

'ant was out of the state at the time of the service of the 'rule, &c. But as it was not made to appear by any positive proof, the auditors, under the circumstances, did not 'feel justified in continuing the said cause."

The auditors' report embraced a statement of the plaintiffs' account, among the items of which were the following:

November 3, 1836.	Cash, - - -	$40
	10 bbls. of apples, -	30

They further stated that, on the 2d of November, 1836, the plaintiffs delivered to the defendant, who was a common carrier, certain articles specified in a receipt executed by the defendant to the plaintiffs of that date, to be transported to Troy, in the state of New York; that on the 3d of said November, the plaintiffs advanced to the defendant the $40 charged in the account; that, at that time, it was expected by the parties that said $40 would go in part of the wages of transportation, and be adjusted on the defendant's tendering his account of said transportation; that the ten barrels of apples were part of the articles embraced in said receipt, and were lost on the passage, by the capsizing of the defendant's boat.

The auditors included in the amount, reported for the plaintiffs, the said $40, and disallowed the charge for the apples.

The report was excepted to by the defendant. On the hearing upon the exceptions, the affidavits of the defendant and of E. A. Stansbury and Wm. P. Briggs* were used by the defendant, and upon the subsequent allowance of exceptions, were made part of the case.

It appears from the affidavit of Ridley that he left the state on his way to Boston, on the 11th of May, 1842; that he returned on the evening of the 22d of the same month; that neither before his departure, nor during his absence, did he receive any notice of an audit in the case, but, upon his said return, he was informed by his family that a notice had been served, but that no copy was preserved, or handed to him, nor was he informed of the time therein set for the audit; that, on the day of the audit, about one o'clock, he was informed of the same by the officer who had served the notice, and that his residence was about 30 miles from Burlington, the place of hearing.

*The affidavit of Briggs is not among the papers furnished the reporter.

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It appeared from the affidavit of Stansbury that he attended, and moved a continuance, as stated in the auditors' report; that he stated to the auditors that the defendant had called on him in the absence of defendant's counsel, W. P. Briggs, and said that he should be absent from the following Monday, (which was about two weeks before the sitting of the court.) in going to and returning from Boston, until the second day of the court, and left directions for said Briggs relative to another case of his then pending in said court, but said nothing about this case, or about having received any notice of the audit.

The county court accepted the report of the auditors, and rendered judgment thereon in favor of the plaintiffs. The defendant excepted.

Briggs & Peck for defendant.

It is among the first principles of natural justice, that no person shall be bound by the adjudication and judgment of a tribunal of whose proceedings he had no notice.

The defendant had no notice. The officer's return showed that a copy was left at his usual abode; and the testimony of Stansbury before the auditors, was sufficient to show that the defendant was out of the state at the time the copy was left. Proof of his having returned should, therefore, have been required by the auditors.

The defendant might, therefore, well claim that the report be set aside. The court have no discretion in such a case. The party may demand his day in court; and it is error not to grant it.

But there is sufficient cause for setting aside the report made in this case, even if the defendant had notice.

1. The action on book should not be extended to the recovery back of money paid by the party in fulfilment of an existing contract; and this court have so decided as to money paid upon a note.

2. But this was money advanced for freight of articles to the city of Troy, on board the defendant's boat, which boat, the report says, was *capsized* as to the *apples*. So that to allow such a recovery in this action would involve in it all the principles of maritime law, on the subject of freight.

3. By the seventh rule of that law, as laid down in the

books, "the master shall be paid his freight for the goods saved from shipwreck." See 7th and 9th Rules, 1 Dane's Dig. 676, 677. *Luke* v. *Lyde*, 2 Burr. 882, 890.

D. A. Smalley, for plaintiffs.

The application to the county court to set aside the report for want of notice, was purely an appeal to their discretion, upon an examination of the facts, in a case appropriate for the exercise of discretion. It is not, therefore, a subject of error.

The book action may be sustained for the recovery of the money in this case. It is the common case of one man advancing to another, who is in his employ, money and other property, expecting it will apply upon his wages; and, on striking the balance, it turns out that the laborer is overpaid. It is settled that book account is the proper action in such cases. *Newton* v. *Higgins*, 2 Vt. R. 366. *Fay et al.* v. *Green*, 2 Aik. 386.

Decisions of the court below, on motions for new trial, are not matter of error. *Newton* v. *Higgins*, 2 Vt. R. 366. *Putnam* v. *Dutton*, 8 Vt. R. 396.

The opinion of the court was delivered by

BENNETT, J.—There is no good reason why the charge of forty dollars, cash, should not have been allowed to the plaintiffs by the auditors. It is true the money was advanced to the defendant, under an expectation of the parties that it should go as part pay of transportation, thereafter to be performed, and to be adjusted upon the defendant's rendering his account for such services. This money was not paid to extinguish a subsisting demand, but was to be kept on foot as a subsisting claim against the defendant, and to be the subject of future adjustment between the parties. It comes within the principle of the cases of *Strong* v. *McConnell*, 10 Vt. 231; and *Chillis* v. *Woods*, 11 Vt. 468.

If the defendant failed to perform any services, or not sufficient to balance that sum, it might well constitute a substantive ground of action.

It is also contended in argument, that there is error in the proceedings of the county court in not setting aside the report of the auditors, for the want of notice. The audit was held on the 23d of May. On the 14th of May notice was

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served on the attorney of record, and on the 16th upon the party himself, by the officer's leaving a copy in the hands of his wife at his usual place of abode. Though, as the defendant discloses, he left home to go to Boston on the 11th of May, yet he returned on the 22d, the day before the audit. When the continuance was moved before the auditors, it was competent for them to have delayed the hearing, if they had thought proper, upon the representation then made to them. The county court, no doubt, in a proper case, might, in their discretion, see fit to set aside a report of auditors; but this is matter purely in their discretion, and can not be the subject of error. If, however, it was within our revision, there is nothing in the case to show that the discretion was not properly exercised.

The judgment of the county court is affirmed, with additional costs.

TOWN OF HUNTINGTON *v.* TOWN OF CHARLOTTE.

It will be presumed, that the supreme court, before granting a bill of divorce, ascertained that they had jurisdiction of the *case*, and of the the *parties*, although it may not appear of record.

Judgments take effect from the time they are rendered, and not from the time they are recorded.

APPEAL from an order of removal of Philander Sheldon from Huntington to Charlotte.

The case was submitted to the county court upon the following statement, agreed upon by the parties, to wit:—

The plaintiffs contend that Isaac Sheldon, the father of the pauper, was, previous to the year 1807, married to one Lucy Kibby, and that he was divorced from her by the supreme court, at their term in Washington county, in February, 1816.

It is admitted that, in 1807, the said Sheldon married a woman then called Charlotte Perry, now living; that, in December, 1816, he married a widow, then called Mrs. Kellogg; and that the pauper, Philander Sheldon, was born of this marriage, March 10, 1821.

If the town of Huntington satisfies the court that Sheldon married the said Lucy Kibby previous to the marriage with Charlotte Perry, and was so far divorced from said

Lucy, that his marriage with Mrs. Kellog was a legal marriage, then the pauper was duly removed, and judgment is to be rendered for said Huntington.

But if the marriage of said Sheldon to said pauper's mother was illegal or void, then said pauper was unduly removed, and judgment is to be rendered for said Charlotte.

Upon the above statement the county court decided that the pauper was duly removed; to which the defendants excepted.

C. Adams, for defendants.

The whole case turns on the effect that is to be given to the proceedings of the supreme court in 1816, on the petition of Sheldon for a divorce.

1. We insist that the court had no jurisdiction. There is nothing in the case, showing that the petitioner ever had any residence in this state; and the law of 1807 is explicit in requiring full proof of permanent residence. This proof is necessary, in order to give the court jurisdiction; and the evidence of it should appear in the proceedings. We have, in this case, not only the record but the docket minutes; and no proof of residence was exhibited.

2. Proceedings in divorce are not according to the common and ordinary jurisdiction of the court, and are, therefore, to be construed strictly. The right to proceed must distinctly appear; and nothing can be taken by presumption.

The laxity which, in times past, has characterized the proceedings in Vermont, on the subject of divorce, and the recklessness with which jurisdiction has been assumed, have subjected us to merited censure. *Jackson* v. *Jackson*, 1 Johns. 424; *Barber* v. *Root*, 10 Mass. 260; *Harrow* v. *Turner*, 14 Mass. 227; Story's Conf. of L.

3. Nothing can be received as evidence of a decree of divorce except the decree itself, signed by the judges and duly enrolled. This is in conformity to the uniform usage in matters of divorce; and is far more necessary in such cases than in chancery. Marriage is a civil institution, most interesting in its nature, and having an important bearing upon the peace of society, and its advancement in civilization and improvement. A power so fearful as the dissolution of it, should be entrusted to nobody, short of the highest ju-

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dicial tribunal in the state; and their proceedings should have the highest verity that their personal signatures can give. They should never be left to the carelessness, or mistakes of ministerial officers; and these proceedings show the danger of leaving the final result to a clerk.

Whoever looks into the existing law on the subject of divorce, will perceive the gross impropriety of any verification short of a decree, signed by the judges, and enrolled; and yet, the powers, as now exercised, are to be verified in no other nor different manner than they were under the old law.

4. Even if the record is competent evidence of the decree, it can only take effect from the recording, in 1823; and the pauper, having been born before, is illegitimate.

The rights of third persons can only be affected by the judgment when recorded. To test this, suppose the record of 1823 had never been made; could the docket minutes be regarded as legal evidence? We think not. A settlement acquired by Sheldon, between 1816 and 1823, must have been communicated to his then wife. Towns interested in the settlement of Sheldon would look only to the record, and by that, only, would they be bound.

J. Maeck, for defendant.

The only question in this case is, whether, in point of fact, Israel Sheldon was divorced from Lucy Kibby, prior to his marriage with Mrs. Kellogg, in December 1816, so far as to render that mariage valid.

1. The court having found the fact that he was divorced in February, 1816, from L. Kibby, we think this finding conclusive.

2. But if the above rule does not apply to this case, where all the evidence is in paper, or where it depends on a record, and he question is as to the effect of the record, then we hold there is nothing in the objection taken by defendant. The court will observe that no question of indentity was raised; but the defendants contend, 1st, That the decree of divorce was wholly inoperative, until it was recorded in the clerk's office; and, 2d, That the record itself does not show that the court had jurisdiction over the parties, or that they lawfully pursued their jurisdiction.

As to the first objection, we say, that it does not appear when the record was made by the clerk—whether before, or after the marriage with Mrs. Kellogg. The legal presumption is, that it was made before. But we consider, that the time when the record was made, in point of fact, is of no consequence. The first marriage of Sheldon was as completely annulled at the moment the decree was made, and the court arose, as it now is. The principle contended for by defendants is, that judgments take effect, not from the time of rendition, but from the time they are recorded. This is not correct. Were it so, the consequence would be that no execution could be executed until the judgment was recorded. The recording of the judgment is but proof of the judgment; and, when done, has relation back to the time of the rendition.

A to the jurisdiction of the court; and whether they lawfully pursued their jurisdiction.

Every thing is supposed to be done, within the jurisdiction of a supreme court. 2 Bac. 102. 6 East, 600. It will be presumed that a supreme court lawfully pursued their jurisdiction.

Even with regard to inferior courts, if they had jurisdiction of the matter, every thing will be intended in favor of their judgment; and they must be taken to have judged right, unless the contrary expressly appears. Willes, 416. 8 Term R. 187.

And it is now settled that, in setting forth, by plea, the proceedings of inferior courts, after stating those facts which give jurisdiction to the court, it is sufficient to state, generally, that such proceedings were had, that such an act was done, without setting forth all the proceedings at length. *Moravia* v. *Sloper*, Willes, 30; *Ladbroke* v. *James*, Ib. 199; *Sollers* v. *Lawrence*, Ib. 413. *Johnson* v. *Warner*, Ib. 528; *Titley* v. *Foxall*, Ib. 688; *Service* v. *Heermance*, 1 Johns. 91; *Peebles* v. *Kittle*, 2 Johns. 363; Cowp. 20; 3 Term R. 185.

If such presumptions are made in favor of the proceedings of inferior courts, the reason is still stronger that the court should presume in favor of the regularity of the proceedings of supreme courts.

Suppose a case, where it becomes necessary for the party to plead the record to establish the fact of a divorce; would

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it be necessary to set forth the facts which gave jurisdiction, and all the facts necessary to show that the court lawfully pursued their jurisdiction? or would it only be necessary to set forth that, at, &c., Sheldon filed his petition, praying for a divorce; and then aver, generally, that such proceedings were had, &c.

Now, if it is necessary to prove these matters, in any more certain manner than by a record, showing the decree of divorce, it is necessary to aver them.

We insist it is not necessary to aver them, specially; and that they are fully proved, when the record comes collaterally in question, by showing a general record of a decree of divorce.

The opinion of the court was delivered by

HEBARD, J.—Two questions are raised in this case, and both affect the validity of the decree of divorce of Sheldon, by the supreme court, in 1816.

In the first place, it is urged that the decree is inoperative and void, because it does not appear from the records of the court, nor from the clerk's docket, that Sheldon had such residence in this state, as would give the court jurisdiction of the case.

This was a matter of fact, that was made to depend upon the proof to be exhibited on the trial, for the purpose of settling the question of jurisdiction; and applies to the person, and not to the subject matter of the dispute. And that being a court of enlarged jurisdiction, we are not only at liberty, but are called upon to presume, that they did not proceed to grant the decree, till the proof established their jurisdiction.

It is further insisted, that the decree only took effect from the time it was recorded.

To adopt such a rule of construction would weaken the force and effect of judgments, and throw numberless embarrassments around judicial proceedings. A judgment must, of necessity, take effect from the time it is rendered, and not from the time it is recorded; for, otherwise, its efficacy would be made to depend upon the action of a functionary, who had nothing to do with its rendition, and who, by law, is vested with no power or authority, but the mere ministerial duty of enrolling it. And this duty

could not always be performed upon the instant of rendering the judgment. To adopt the rule contended for, would, in numerous instances, subject the efficacy of a judgment to the law of necessity, to the happening of accidental circumstances, and to the will and caprice of a ministerial officer.

This decree, for all the purposes intended, was good when it was passed, and the record, when made up, had relation back to the passing of the decree.

Judgment affirmed.

JOHN CHIPMAN *v.* SETH BATES.

In a plea of justification under a search warrant, it is not necessary to allege that the complaint was signed, or any minute made of the day, month and year when exhibited; or that any recognizance for cost was given, or that the warrant was returned; nor is it necessary to state the grounds of suspicion of the person praying out the warrant.

If the officer enters the dwelling house of the person against whom the process issues, the door being open, and without doing any unnecessary damage, to execute the same, the owner of the house cannot maintain trespass against the party who prays out the process, although the goods were not found.

Quere.—Whether the party would be liable in such action, if the door had been forcibly broken open by the officer.

THIS was an action of trespass in three counts, for breaking, and entering, the dwelling house of the plaintiff; to the last of which the defendant pleaded in bar, a justification under a search warrant, setting forth that he had been lawfully possessed of a certain ram, which had been stolen from him; that, upon his complaint, on oath, that he had reasonable, probable and sufficient cause to suspect and believe that said ram was by the plaintiff, knowing said ram to have been stolen, secreted in his dwelling house, a warrant was issued by a justice of the peace, directed to the constable of Essex, commanding him to enter said dwelling house in the day time and search for said ram; that the said constable, and the defendant as his servant, and by his command, in virtue of said warrant, in the day time, peaceably and quietly entered into the said dwelling house, and cellar of the plaintiff, the outer door thereof being then and there

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open, in order to search for and find the said ram, so stolen as aforesaid, and for no other purpose whatever—doing no unnecessary damage to the plaintiff, nor creating unnecessary disturbance in said dwelling.

To this plea there was a demurrer. The court adjudged the plea insufficient; to which the defendant excepted.

C. D. Kasson, for defendant.

The demurrer being *general*, the plea must stand or fall, as it shall be found good or bad in *substance*, without regard to its mere form. 1 Chit. Pl. 701–3.

I. The objection that the cause or ground of the "belief" or "suspicion" is not stated, is one of *form* only. The substantive averment consists in this—that the defendant had "*sufficient cause*" &c., and it is for the *jury to find*, from the *evidence*, whether this be true. *Davis* v. *Russell et al.* 5 Bing. 354; 2 Ld. R. 1301; *Beckwith* v. *Philly*, 6 B. & C. 635; *French* v. *Smith et al.* 4 Vt. R. 366; 1 Chit. Pl. 713, 719, 722.

Admitting it to be a *compound of law and fact*, it does not vary the case; for almost every proposition which is a bar to the action, consists of such a compound.

Non est factum does not require the defendant to state the *reason why* it is not his deed. He may show it a forgery, or obtained by duress, or fraud. He may show a want of delivery, or any thing else, which, when proved, the law adjudges to amount to the proposition that it is not his *deed*.

So of *son assault demesne*; he need not allege the *manner*. And so of all other propositions which are a *bar* to the action.

In an action for malicious prosecution, the defendant may simply traverse the "probable cause."

All those cases wherein the contrary doctrine has seemingly been holden, were actions for *false imprisonment*, where the arrest was made *without lawful warrant*. But no case is to be found, where, when the proceeding was had *under the authority of the law, as here*, the defendant was ever bound to set out the evidence, which tends to prove the fact of "*probable cause*."

The law has reposed *in the magistrate* the power to de-

cide upon the cause for issuing a warrant. He has decided; and this court cannot, in this collateral manner, call in question that decision. The only question is—had the defendant cause for making the complaint? If this be not so; if the court can claim to have all the *complex circumstances* spread upon the record *for their decision*, it would oust the defendant of his *trial by jury*; it would leave the court to decide upon the *weight* and *force* of each *circumstance in evidence*, in proving the "probable cause," which is clearly the province of a jury. *French* v. *Smith*, 4 Vt. R. 366; 1 Chit. Pl. 258.

It would be *impracticable* to state the ground of suspicion. The cause of it is often of such a nature as to preclude the spreading of it on the record; or such as to make it too prolix. Public rumour, and the source of it; words spoken by particular individuals, and the relation they bear to the parties; the mode of expression; hints; ironical or satirical remarks, and their circumstances; looks; vague surmises; winks, nods, and other obliquities and their occasions are but a few of the means of insinuation, which may or may not, as circumstances shall indicate, induce belief and justify prompt action; and which it would be impossible to give an idea of to the court. 1 Chit. Pl. 262, 270, 567. (n. 2.)

II. The remaining and main question is, whether with "sufficient cause of suspicion" a search warrant, in due form, is a justification of a party, in entering the house *unless he find the property?*

1. The court will observe, that *the plea shows a felony had been committed:* and this will dispose of a large class of cases which may seem to militate against our position, and which I shall not again notice.

Whatever the *common law* might have been, *anciently*, we contend, that, by virtue of Art. IX. of the declaration of rights in the constitution of Vermont, and also the 4th Art. Amend. Con. U. S., together with our state legislation on the same subject, (Rev. Stat. Vt. p. 177) the common law, *if it ever existed* to the contrary, is unqualifiedly abolished.

2. It is a curious fact, that while most elementary writers lay down the law in the negative of the proposition, not a single *adjudged case* is to be found to support their *dicta;* and 2d, that all later writers refer to Lord Hale as their au-

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thority, Hal. P. C., and he cites some Mss. in the time of Hen. 2d. This is the evidence of what the common law *was*. Since that time, either Parliament has enacted some statute to remedy the evil, or else that is not considered the law now, or we should find some cases of less remote antiquity.

The later cases, what we do find, seem to indicate that the English courts are, whatever might have been the law, inclined to make it conform to the advancing civilization. In *Samuel* v. *Payne*, Doug. 260, *the goods were not found*, and the court held ultimately, that if *a felony had been committed*, it would, with *probable cause*, justify the *complainant* in arresting; but as to all but him the *mere charging* of *the felony whether true or false* was *sufficient*.

This doctrine is since recognized in *Davis* v. *Russell*, 5 Bing. 354, by Park, J.; and by Littledale, J., in *Beckwith* v. *Philby*, 6 B. & C. 637, where, if any *actual felony* have been committed, the complainant may justify on showing *probable cause*.

Those were cases of false imprisonment to be sure; but, certainly, personal liberty is quite as sacred as rights of property.

If the common law ever stood as contended by the plaintiff, it was a manifest relic of an antiquated feudal barbarism; and such an one as the courts of America will not readily adopt.

The only cases we have been able to find in the United States, are *Bell* v. *Clapp*, 10 J. R. 263, where the goods were found, though the court lay no stress on that fact; and *Beatty* v. *Perkins*, 6 Wend. R. 382, where the *goods were not found*; and though the warrant issued on the *mere allegation* of the defendant without apparent "probable cause," the court held, after a thorough review of all the authorities, that *it was a good justification*. The last case is identical with this.

3. There is another view of the case, arising out of the cases above cited, which is conclusive against the plaintiff's action. The plea shows that the defendant entered under the authority of the *law*, and *as the servant, and by the command of, the proper officer of the law*.

This, as regards the *vi et armis*, is the *act of the law*, and justifies the *force*, *&c.*

And it is well settled, both in England and this state, that in *trespass*, where the act is done under authority of *legal process*, the "*virtute cujus*" is *not traversable*. The attempt here is to show that the defendant, though acting under the law, wrongfully *set the law in motion*. This cannot be done. And it presents a fine illustration of the true distinction between trespass, *vi et armis*, and *on the case*—the one is applicable where the injury is *direct* and *immediately consequent* upon the *unlawful act*—the other where the injury, or its immediate cause, is only consequential, and remote, from the *unlawful act*.

The *entering of the house was legalized* by *our* statute. Hence *that act was not unlawful*. If there was any thing *unlawful*, it was the act of the defendant in *making the complaint*; but for this the plaintiff could not have *trespass*, for it lacked the *vi et armis*, and could work no injury *in and of itself*. If it wrought an injury, it was by *setting the law in motion* to do the *forcible* acts. In this view it likens itself to a case of *malicious prosecution*. Ham. N. P. 114, 121–2; 1 Ld. R. 412; 1 Saund. 298; 11 Vt. R. 22; 3 East R. 593; 1 Chit. Pl. 152; 3 T. R. 185; *Boot* v. *Cooper*, 1 T. R. 535.

J. Maeck, for plaintiff.

Two questions arise in the present case: first, is the plea sufficient; second, if the plea is not sufficient, then is the declaration sufficient in form and substance, and appropriate to the cause of complaint.

I. The plea: which it is contended is bad. The plea attempts to set up a justification under process of an inferior court. The process was one of an extraordinary character, unknown to the common law; (Coke, 4 Inst. 176; 1 Chitt. Crim. L. 64) a process which, in its execution, most deeply affects the feelings and character of the individuals who are made subject to its operation. It is highly proper that it should be watched with great jealousy by the higher tribunals; and no justification under it is ever to be held good, unless the party shows by his plea that he has conformed himself to the law in every particular, in praying out, and executing the warrant. He is bound, in pleading, not only to set forth the warrant itself, but a justifiable cause for

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praying it out; and to show that he has conformed himself to all those requisitions which the law has made necessary to warrant the magistrate in issuing it. 1 Chitty's Pl. 205; *Green* v. *Jones*, 1 Saunder's R. 298.

If, to give the magistrate jurisdiction and authority to issue the warrant, there were certain things to be done which were not done, then the whole proceedings were absolutely void. The party is considered, in law, as proceeding without any legal authority whatever. None of the authorities pretend to countenance the proposition contended for by defendant, that case must be the remedy where the act was done under the authority of a court of competent jurisdiction, unless the process was *regular*. 1 Chitty's Pl. 127; 3 Term R. 185; *Boot* v. *Cooper*, 1 T. R. 535; 11 East, 107; 1 Camp. 295.

But if the process were irregular, as when it was granted without oath, trespass is the proper remedy, even against the magistrate. Chitty's Pl. 125; *Morgan* v. *Hughes*, 2 Term R. 235.

The plea, then, not setting out sufficient to show the magistrate had authority to issue the warrant, the process is irregularly issued.

1. It is not alleged that the complaint was signed. Signing is obviously contemplated by the statute, as it ought to be preserved on file.

2. It is not alleged that the magistrate, before issuing the warrant, minuted on the complaint the true day, month and year when the same was exhibited and filed in his office. Old statute, page 289, section 5. For want of this, it is held the whole proceedings are a nullity. *State Treasurer* v. *Cook*, 6 Vt. R. 283.

3. It is not alleged that the magistrate took any bonds from the prosecutor to the plaintiff for costs. Old statute, 127, sec. 10.

All these are positive requirements of the statute, are required to be done by the magistrate before he has any authority to issue his warrant; and if he issues his warrant without them, the whole proceeding is nugatory. So far as the party is concerned, the question is not whether the warrant is good on the face of it, but has he and the magistrate done all the law requires to authorize it. See again

Chitty's Pl. 128, 2 Term R. 235, 2 Chitty's R. 304, 1 D. & R. 97.

It is not averred that the search warrant has been returned. The defendant here attempts to justify under an authority in law. If he fails in doing all the law requires of him, he becomes a trespasser *ab initio*; and this rule holds so far as regards the return of the process, though the act may be a mere nonfeasance. "If a sheriff have not returned a writ 'which ought to have been returned, he becomes, although 'this be only a nonfeasance, a trespasser *ab initio*, as to 'every thing which had been done under it." Salk. 409, Ld. Raymond, 632; Cro. Car. 446; 6 Bacon's Ab. 561, Willson's ed. The party, as he set the process in motion, stands in the same predicament.

Again: The plea does not set forth any fact existing, which would justify Bates in supposing, or believing, Chipman had stolen his property, or had it secreted. It merely sets forth "that Bates had reasonable, probable cause and 'sufficient grounds to suspect, believe,' &c." What is there here for the plaintiff to traverse but conclusions of law, which are not traversable? The facts which constitute these grounds should have been set forth. *Marl* v. *King*, 4 Taunt. 33; *J. Anson* v. *Stewart*, 1 Term R. 748. Stephen on Pleading, 385, 386. See the precedent for a plea of this description, 3d vol. Chitty's Pl. 1081.

Lastly: The plea does not show the property was found on search; consequently process affords no justification, and the action of trespass lies. So are the authorities. 1 Esp. N. P. 399; Hale's Pl. 150; 1 Swift's Digest, 405, 496; 2 Hale's Pl. 114, 151; Conductor Generalis, 314, title Search Warrant; *Entick* v. *Carrington*, 2 Willson, 291–2, 382, 495; *Bostock* v. *Saunders*, 3 Willson, 440; 3 Jacob's L. D. 610. See the cases cited in 6 Wendell; and on examination, it will be found the cases there cited by Judge Savage do not sustain the opinion of the judge.

In *Bostock* v. *Saunders*, De Grey, Ch. J. said that unless the goods were found, the party could not justify, but was a trespasser. The same language is held in all the cases. A single case only is found to the contrary, *Beatty* v. *Perkins*, 6 Wendell, 382. In the case in 10 Johns. 263, referred to in that case, the goods were found; therefore, in

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that case, the event justified the process. The case in Wendell attempts to limit the doctrine of Lord Hale to the case where doors are broken and no property found; and it would seem the court, in the case in Wendell, admit if doors were broken and the property is not found, then the process affords no justification. But Lord Hale did not so limit his doctrine, though he was favorable to search warrants. But the great argument of Judge Savage is, that it was an act done under process of a court, and trespass would not lie, but case was the proper remedy. Why, let us ask, if he is correct on the ground he proceeds upon, if it was necessary to break doors to execute the warrant, should not the action be case in both instances? That the action of trespass will lie against a party who enters the plaintiff's house to execute a search warrant, unless he finds the property, has been too long and firmly settled by a series of decisions, to be shaken by any doubts thrown over it, by a single case. Though sustaining trespass in such cases may not so well harmonise with the principles of the two actions as to sustain case, yet the dividing line between the two actions it is sometimes difficult to find. No great principle would be sacrificed if it was entirely destroyed; and the principle that trespass will lie having been long sustained, it ought not now to be disturbed. It is better to stand to decisions, that the people may know what the law is, than, by questioning the principles on which they are founded, and overturning them, constantly to increase the doubts, confusion and uncertainty as to what the law is. To revolutionize the law is the proper province of the legislature; but the duty of the judge, as we understand it, is, to administer the law as it has been administered by his predecessors; to follow in the course of decisions, though in his own opinion, a better course might have been originally adopted. In the case of *The King* v. *Wheatly*, 2 Burr. 1128, Lord Mansfield says "when the law is established, 'and settled, on whatever grounds it was originally establish-'ed, yet it ought to be adhered to."

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The third count in the declaration is in trespass for breaking and entering the dwelling-house of

the plaintiff. The plea justifies the breaking, &c., under a search warrant. This plea is demurred to.

A warrant of this description is recognized both by our constitution and laws, and the authority of a justice of the peace, to issue such a warrant has never been questioned. The constitution requires, that such warrants shall not issue, without oath or affirmation first made, affording sufficient foundation for them; and the oath must disclose that goods have been stolen, and that the applicant suspects they are concealed in a place, which he wishes to have searched. We do not discover either from the nature of the process, or from the forms, that it is necessary, that any complaint should be signed by the applicant, nor that any minute should be made of the day, month, and year, when presented; or that any recognizance for cost should be given, or that it should be returned, if the goods are not found. Indeed, these requirements are only necessary, when a complaint is made, which is intended to be the incipient step, in a prosecution against any one for an offence. The object of a search warrant is, to obtain the goods, and to bring the person, in whose custody they are found, either to be recognized as a witness, or to be subject to such further proceedings as the ends of justice may require. The magistrate must determine whether there are sufficient grounds to require the issuing of the warrant; and these grounds need not, and cannot well be stated, in a plea justifying proceedings under the warrant. The mere formal objections to the validity of the plea have not, therefore, stood in the way of our determining its sufficiency on its merits.

The main and important question is, whether, as it is not stated in the plea, that the stolen goods were found, the warrant will justify the person who procured it to be issued.

The authority of a sheriff, or other officer, in the execution of a search warrant is, to enter the house in the day time, the doors being open and make search for stolen goods; and thus far, he has the same authority as he has in the service of civil process; by virtue of which he may peaceably enter the dwelling house, to serve the same, the doors being open. He may, however, do something more to execute a search warrant. He may break open the doors to execute the same, if admittance is denied, and whether the

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goods are found or not, the officer and his assistants are justified. But, according to the opinion of Lord Hale, the party who prays it out, is liable in an action of trespass, if the goods are not found. And indeed, it would seem to be reasonable, that, as in every case, a person who is proceeded against, on the complaint of a private individual, is to have indemnity for his costs, so in this case, he should have redress for any injury he may sustain, if the complaint is unfounded, without any inquiry as to the motives which led to the prosecution, except so far as they might enhance or lessen the damages. The opinion of Lord Hale has been questioned and directly overruled in the case of *Beatty* v. *Perkins*, 6 Wendell, 382; and were it necessary, in this case, to reject the authority of Lord Hale, and adopt the principle of the case last mentioned, the court are divided in opinion, and this cause would be postponed for further argument. I, for one, should be disposed to recognize this opinion of Hale, as the safer and better law, and, indeed, as the settled doctrines of the common law, from which we are not at liberty to depart.

Lord Hale says, 2 P. C. 151, "Whether the stolen 'goods are in the suspected place or not, the officer and his 'assistants, in the day time, may enter *per ostia apertia*, to 'make search; and it is justifiable by this warrant. If the 'door be shut, the officer, after demand to open it and refu-'sal, may justify breaking the door whether the stolen goods 'are there or not; but as to the party, upon whose sugges-'tion the warrant issued, the breaking the door is, *in eventu*, 'lawful or unlawful; viz., lawful, if the goods are there, 'unlawful if they are not there." From this opinion it seems the party is only liable, when the doors are forcibly broken open; and there can be no good reason why, as to the officer and party, the entry without force, the doors being open, should not be justified, as it would be, in case the officer entered to serve civil process. The owner of a dwelling-house has the privilege of closing his doors, to protect his family in every case, except when the administration of public justice requires that they should be opened, even against his will. The reason given for this, is, "that the 'family within doors shall not be left naked and exposed to 'robbers from without." But if his doors are left open, he

permits them to be thus exposed, and every part of his dwelling-house is within the precinct of an officer, who has either civil or criminal process to be executed therein. In the plea in this case, it is averred that the entry was peaceably made, the doors being open; and any forcible breaking open of any doors is denied; and, on this ground, we are of opinion that it discloses a sufficient justification. The judgment of the county court is, therefore, reversed, and judgment must be rendered for the defendant to recover his cost, as the other issues were found in his favor in the court below.

WILLIAM P. BRIGGS *v.* TOWN OF GEORGIA.

In an action of assumpsit for service as an attorney, the pocket docket of the plaintiff, on which is entered the name of the case in which he acted as counsel, of itself, furnishes no evidence of his right to charge for his services.

Plaintiff having argued a cause, at the suggestion of the counsel employed in it, his subsequent assent to a proposal of the counsel to make application to his client, to engage plaintiff in the cause, may be given in evidence, for the purpose of showing whether plaintiff rendered the service, expecting to be paid for it.

A want of a freehold qualification in one of the jurors, is a ground for a new trial, if the fact was not known to the party making the motion, at the time of the trial.

THIS was an action of assumpsit for work and labor done by plaintiff as attorney for the defendant.

Plea, general issue; and trial by jury.

The plaintiff, to maintain the issue on his part, introduced in evidence the docket of the county court, for March term, 1833, by which it appeared that a suit was then pending in said court, in favor of *Ethan Austin* v. *The town of Georgia*; and also the docket of the said court, for the August and March terms then next following, from which it appeared, that, at the said August term, another suit was entered on said docket, in favor of the same Austin against the said town of Georgia, when both of said cases were continued, and that the names of H. Allen and the plaintiff appeared as attornies for defendant; and that at the March term, 1834, the two suits were discontinued; that Mr. Allen was then at Washington, and that no other names were entered on the docket as attornies for Georgia except his and Briggs'.

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The plaintiff then introduced evidence tending to prove, that, at the March term, 1833, he, with Mr. Allen, attended the trial, and argued the case to the jury, for the town of Georgia; and that one Mr. Bliss, the agent of the town, sat by, during the whole trial, and aided both the plaintiff and Mr. Allen in asking questions. The plaintiff also read in evidence his own day book, showing charges to have been entered thereon against said town, in the usual course of business, and accompanied it with evidence, tending to prove that he kept a fair and regular book. The plaintiff then offered in evidence his own private pocket dockets of the three county courts aforesaid, to show that the suits of Austin against Georgia were entered thereon—which was objected to and excluded by the court.

The defendant then introduced said Heman Allen, whose testimony tended to prove that he was the attorney of the town of Georgia in the suits aforesaid, and that, at the March term, 1833, after the suit was called, and while they were empanelling the jury, or reading the declaration, the said Briggs came to him and asked him what kind of a suit he had, and he, Allen, told him, and further remarked, it would be a good cause to argue, and said "come, wont you sit down and give me a lift?" (or "help me?") that Briggs replied he would, and did, thereupon, sit down, and attend through the trial, and argue the cause to the jury; and that, immediately after verdict was returned into court against the plaintiff, he, Allen, said to Briggs, I will see the agent, Bliss, (who was then in the court house,) and endeavor to get you engaged; to which Briggs assented;—that Allen went to another part of the house and saw Bliss, and told him, that he, Briggs, had argued the case well, and that perhaps he, Allen, might not be here when the case would be finally tried and thought he had better engage Mr. Briggs. The agent, Bliss, replied, he did not know what the town would do with the suits; they might be settled, and he did not know as he had authority to engage any further counsel, and, at all events, he would not then engage Mr. Briggs; and this reply Mr. Allen immediately repeated to Mr. Briggs. The same evidence tended to prove that at the August term, 1833, both the aforesaid suits were continued by agreement, and that Allen was, at the time, in court, and attended to them.

The defendant also introduced the agent of the town, Bliss, who testified that he had never engaged Mr. Briggs, and when he saw him sitting by and assisting Mr. Allen, he did not know how he came to be there, but supposed it was from some understanding between Allen and Briggs, and did not think of his charging the town; though he sat by, and might have suggested questions to Allen and Briggs. The testimony of the same witness also tended to prove that between the August term, 1833, and the March term, 1834, both the Austin suits were arbitrated, and an award made, and the suits were agreed to be discontinued.

The said Allen's testimony further tended to prove, that he did not employ the said Briggs to attend to said suits or argue the case, in behalf of the town of Georgia, with an expectation that he was to charge the town; that he was only the attorney, and not the agent, of the town in any other wise; and that, at the time, he supposed it was understood between him and Mr. Briggs, that his services were gratuitous, and matter of courtesy between them. The plaintiff objected to that portion of the said Allen's testimony which relates to his having conversation, after the trial, with the agent of the town, in regard to his employing the said Briggs in future to attend to the trial; but the witness testifying that the substance of the conversation was communicated to the plaintiff, the objection was overruled.

The court charged the jury, that, if they found, from the testimony, that the plaintiff, at the time he rendered the services, for which he claims to recover of the defendants, did not intend to charge the town for the same, but, on his part, designed that they should be gratuitous and not made the ground of claim for a pecuniary satisfaction, he could not recover in this action.

The jury were also told, that, in ordinary cases, it was necessary, before a party could recover of another for services rendered, that the jury should be satisfied that the services were rendered at the request of the other party, either expressed or to be implied from the circumstances of the case; that, in this case, the conversation between the plaintiff and Mr. Allen, as given in evidence, (it appearing that he was simply the attorney for the town, and had no other agency in the management of the suit, and Bliss, the agent for the

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town, being present and taking charge of the same) could have no effect to bind the town further than it was expressly or impliedly assented to on the part of the town, or of Bliss their agent; and that, so far, the town would be bound by the acts of Mr. Allen the attorney; and that the important inquiry for the jury was, whether, from the whole evidence in the case, they could find that the plaintiff had been employed by the town or their agent, to render the services; that it was not necessary that this should be proved by direct evidence, but the jury might imply it from circumstances; and that, if they found the agent of the town sat by at the trial, and aided in communicating with the plaintiff, as well as with Mr. Allen, it was strong evidence of an employment of the plaintiff by the town, but not necessarily conclusive; and that, to determine this point, they must take into consideration the whole evidence in the case; and that, if from this, they found an employment, or could infer one from the circumstances of the case, it would be their duty to render a verdict for the plaintiff.

The jury were further instructed, that if the agent, Bliss, sat by, at the trial, and saw the plaintiff rendering the services, and supposed, or had reason to suppose, that the plaintiff intended to charge the town for the same, supposing on his part, he had a right to do so, and the agent suffered him to perform the services, neglecting, at the time, to correct the mistake, and undeceive the plaintiff in this particular, the plaintiff had a right to recover without further evidence of employment.

The jury returned a verdict for the defendant. After verdict, the plaintiff moved for a new trial, on the ground that Heman Allen, the witness, was interested on behalf of the defendant—a fact not known to the plaintiff at the time of trial. To show this interest, he presented the affidavit of S. M. Parsons, tending to prove that, in August, 1839, Mr. Allen said, in his presence, that the plaintiff had no just claim against the town of Georgia, but that, if he was entitled to any fees, he, Allen, ought to pay him.

The motion for a new trial was, also, placed on the ground that Joseph Smith, Jr., one of the jurors who sat in the trial of the case, was not a freeholder. And it appeared to the satisfaction of the court that the said juror was not a free-

holder, at the time of trial; and it also appeared from the affidavit of the plaintiff, that he did not know that fact at the trial.

The court overruled the motion, and rendered judgment on the verdict. The plaintiff excepted.

Wm. P. Briggs & C. D. Kasson for plaintiff.

1. The private docket was, equally with the day book, *competent* evidence.

The books of a party are admissible, upon the ground that they are supposed to contain a true record of the transactions therein noted, in the ordinary course of business, when accompanied with evidence to show that the party keeps correct accounts. The docket, which is, in reality, the *original entry* of the party, going, as it does, to corroborate the entries in the book, stands upon the same or stronger ground than the book itself. *Burnham* v. *Adams*, 5 Vt. R. 313; *Warren* v. *Grenville*, 2 Stra. 1129; *Prince* v. *Smith*, 4 Mass. 455; *Faxon* v. *Holliss*, 13 Mass. 427; *Coggswell* v. *Dolliver*, 2 Mass. 217.

2. The objection to the conversation of Allen and Bliss *after* the trial, was well taken. What was then said by defendants could not affect plaintiff's right already accrued. The court should have limited its application at least to the subsequent services. See authorities below.

3. The charge of the court should relate to the testimony in the case. There was no testimony to show that plaintiff did *not intend* to charge for his services. Nor was his intention, unless expressed in some way by himself, who alone could discover it, at all material. But, as the case is bare of testimony to show plaintiff's intention, the court should have charged the jury, that there was no evidence in the case to elucidate that intention. Hence that they should lay that out of the case. *Knapp & Worden* v. *Winchester*, 11 Vt. R. 351. *Brackett et ux.* v. *Wait et al.* 6 do. 428–9. *Birney* v. *Martin*, 3 Vt. R. 238. *Mason* v. *Silver*, 1 Aik. R. 369. *Vail* v. *Strong*, 10 Vt. R.

4. The charge next puts the case upon the ground that the jury must find the *assent* of the town or its *agent*, either *express or implied*; and that if they do find such assent, the plaintiff may recover.

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But, in order to find this assent, they are directed to look to, and weigh, "the *whole evidence* in the case." And that *whole* evidence is, that the *agent* whose "*assent*" is required, says expressly, *after the services are rendered*, i.e. when on the stand now as a witness, that he had *no idea of assenting*.

How could the jury, when directed to find the assent from the whole evidence, ever find it when the fact was *expressly negated by improper testimony*? They should have been told that their decision was to be based, as to the first service, upon the facts and evidence as they existed at the time of rendering them, and that the subsequent "*suppositions*" and conversations of Bliss and Allen could have no such *ex post facto* operation. *Wetherbee* v. *Foster*, 5 Vt. R. 142. *Gibson et al.* v. *Seymour*, 3 Vt. R. 567–9; and authorities before cited.

5. The charge concludes with resting the plaintiff's right upon this: That if Bliss, at the time of the jury trial, "supposed," "or had reason to suppose," that the plaintiff intended to charge the town for his services, supposing on his part, that he had a right to do so, and suffered him to perform them, neglecting to correct the mistake, in this particular, the plaintiff had a right to recover. To this there are two objections.

1. The subsequent "suppositions" of Bliss are required to be considered by the jury, and Bliss' testimony expressly negatives the fact that he supposed any thing about it.

2. If the jury should find a reason for such a *supposition*, (which they cannot, when compelled to weigh such improper testimony,) how is it material, what he might *suppose* that Briggs was intending? For note, that it is made the express condition, not only that Bliss supposed that Briggs *intended* to charge, but that he also supposed that Briggs *supposed he had a right to charge*.

The great error in the charge consists in this, that the jury were not charged in a manner called for by the testimony; nor to assist them in arriving at a correct conclusion. They should have been told that, in determining the fact of *employment* by Mr. Allen, and assent by Bliss, they should not look to the *whole* evidence; they should lay out of the case both Allen's and Bliss' private suppositions, and look no farther than to such acts and expressions of Allen and Bliss as

were, before, or during, the rendering of the service, carried home to the plaintiff's knowledge;—that Briggs' rights could not depend on their *secret motives*. They should, also, have been told, that the suppositions of Allen and Bliss could only apply to the subsequent services; and that, even though they should not find the assent of the defendant to the subsequent services, it would not follow that there was no assent to the first employment, as that portion of the testimony could not operate retrospectively against Briggs, who was no party to the same; that, in the absence of any declaration of the plaintiff, the conversation and conduct of the parties up to, and during, the first services, were the only proper evidence for them to weigh in determining the rights and liabilities of the parties, as to those services. Where the exceptions detail the evidence, and it appears that the charge of the court either was inapplicable to the evidence or calculated to mislead the jury, it is error. See authorities above cited.

6. There was also error in the court below in refusing a new trial. The constitution guarantees the trial by jury, and a jury of such qualifications as the laws of the land may prescribe, to wit, judicious men and freeholders. Hence, if a party is compelled to go to trial before twelve men, not having these qualifications, it is, to say the least, a mis-trial. Smith, the juror, was legally disqualified, and a legal disqualification to do an act, must, certainly, be as fatal as a mental disqualification. The term judicious men, here used, must mean men of legal discretion. Could a party be bound by the verdict of a *minor* or a *non-compos*, because he did not inquire into the facts relative to the whole panel before presenting his case to them? The party injured, in either of these cases, is entitled to a new trial, as a matter of right. *Fines* v. *Norton*, Cro. Car. 278; *Calthorp* v. *Newton*, Cro. Jac. 647; *Lady Herbert* v. *Shaw*, 11 Mod. 118; *Parker* v. *Thornton*, 2 Ld. Raym. 1410; *Russel* v. *Ball*, Barnes 455; *The King* v. *Tremaine*, 16 C. L. 318, (7 Dow. & Ryl. 684); *Shane* v. *Clark*, 3 Han. & McHenry, 101; *State* v. *Babcock*, 1 Conn. 401; *Amherst* v. *Hadley*, 1 Pick. 38; 11 C. L. 218; 15 C. L. 251; 3 Vt. R. 570; *Hasset* v. *Paine*, Cro. Eliz. 256.

The case shows the materiality of the witness, Allen, to

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the defendants. And, if the testimony of Parsons is to be credited, he is not only interested, but makes himself (as matter of conscience) the real party to the defence; and, as such, he can never be made a competent witness by a discharge. *Skillinger* v. *Bolt*, Conn. R. 147; 2 Stark. Ev. 745 (1.)

A. G. Whittemore, for defendant.

I. The first exception taken by the plaintiffs is to the decision of the court excluding his *pocket* docket or private memorandum of what he had to do, or was doing in court, from being read in evidence.

This was clearly correct. His usual day book had been previously admitted and read to the jury. The court might as well have admitted any other private statement of the plaintiff, which he chose to write down and keep in his pocket, as his *pocket docket*.

II. The next objection appears to be, to the admission of Mr. Allen's testimony as to the conversation he had with Bliss, the defendant's agent, immediately after the trial, and with the request or assent of the plaintiff, and at the time, repeated by Mr. Allen to the plaintiff.

This conversation, under the circumstances, was proper and legal evidence, for two purposes—

1. To show what the plaintiff and Bliss, defendant's agent, and Allen, defendant's attorney, understood to be the character of the plaintiff's services, and whether, at the time, either expected he was to have a pecuniary compensation therefor. *Briggs* v. *Georgia*, 10 Vt. 68.

2. The Plaintiff's specification showed a claim of some $10 or $15 for services in the same suit, at subsequent times, without any pretence of any further, or other employment. His testimony was, therefore, clearly pertinent and forcible to prove that the plaintiff was not engaged after that time, and had no reason to suppose he was.

III. The charge was in pursuance of the decisions made by this court in this case at a previous term—see 10 Vt. 68—though clearly bearing in favor of the plaintiff. The exceptions, if any, must be to the finding of the jury, and not to the charge of the court.

IV. There are two causes alleged for a new trial.

The first is frivolous. The object would seem to be to have an opportunity to impeach Mr. Allen; for his declarations out of court could not deprive the defendant of his testimony.

2. The cause assigned, that J. Smith jr., one of the jurors who tried the cause, and who was on the legal panel of jurors through the term, was not a freeholder, is only a ground for a challenge and not for a new trial.

The statute directing the selection of jurors—Rev. L. of 1824, p. 410, sec. 5—is directory merely, and a neglect to conform to its provisions will not, *per se*, be a sufficient ground for setting aside the verdict, when the court see that the party cannot have been prejudiced by it. *People* v. *Rawson*, Wend. 422. *Cote* v. *Perry*, 6 Cow. 584.

Suppose a town clerk puts the name of one of the jurors in the box, without having them chosen by the inhabitants present, would that be a cause for setting aside the verdict? Suppose the sheriff should summon the jury from different towns than those ordered by the court, would that vitiate the verdict? Suppose the town should elect a constable, selectman, fenceviewer, or other town officer, who was not a freeholder, would that render such election illegal? Are all such official acts void, or voidable? Most certainly not. And yet the language of the act is *far more imperative* in regard to such officers being freeholders, than in regard to jurors.

The fact that a juror is not a freeholder, does not destroy his judgment, nor make him a partial juror, nor affect the obligation he is under to find a verdict according to the truth. *Gilbert* v. *Rider*, Kirby, 184.

The juror not being challenged when he was impannelled, the objection is waived. *Wray* v. *Thorn & Hancock*, Willes, 488; *Hill* v. *Yates*, 12 East, 229, and a case there cited by Lord Ellenborough; *The King* v. *Suttons & others*, 15 C. L. 252, in point; *Orcott* v. *Carpenter*, 1 Tyler, 250.

The case of *Norman* v. *Beaumont*, Willes, 484, and *King* v. *Tremaine*, 16 C. L. 318, do not conflict with this position. 1 C. L. 452.

They were both cases where the person sitting as a juror was not of the panel, but falsely answered to the name of one who was, and took *his place*. As the acting juror took the name of, and falsely personated and acted as the real,

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legal juror, though without any qualifications, the court say the party could take no challenge, as he was not of the panel; but expressly admit that if he had an opportunity to challenge, and omitted to take it, no new trial could be granted.

The same rule has been recognized and adopted in Massachusetts. *Jeffries* v. *Randall*, 14 Mass. R. 250; *Amherst* v. *Hadley*, 1 Pick. 38; *Howland* v. *Gifford*. 1 Pick. 43.

The only case we have been able to find where a contrary doctrine has been held, is *State* v. *Babcock*, 1 Conn. 401. That was a capital case, decided without argument or reference to any authority to sustain it; and it is directly opposed to all previous decisions upon the question in that state. *Gilbert* v. *Kid*, Kirby, 184; *Sellick* v. *S. H. Turnpike Co.* 13 Con. 459.

If it be a ground for a new trial at all, it is certainly not a matter of right, but addressed to the sound discretion of the court to *grant* or *refuse*, as the court, trying the case, should consider *justice* required. *Hill* v. *Yates*, 12 East, 229; *Amherst* v. *Hadley*, 1 Pick. 42; *Jeffries et al.* v. *Randall*, 14 Mass. 205.

It is not pretended, in this case, there was corruption or improper conduct on the part of the juror; or that the verdict would have been varied, if he had not sat on the trial.

This being a motion for a new trial, made to the county court, and addressed to the sound discretion of that court, their decision is not a matter of error, and cannot be revised in this court.

The opinion of the court was delivered by

HEBARD, J.—The first point made in the case is the decision of the county court, in excluding the pocket docket of the plaintiff from going to the jury as evidence. And, in this decision, we discover no such error as would justify us in sending the case back for a new trial. It cannot reasonably be supposed that the jury would have come to any different result, if this docket had been before them. The question was not whether the plaintiff had rendered the services for which he claimed pay, but whether, at the time he was rendering those services, he expected to be paid for them, and whether the agent of the town had reason to suppose the plaintiff so understood it. It was not proposed

to accompany the docket with any proof that it was the custom and practice of the plaintiff to make charges for his services in such docket, or that any were made; but the offer was, "to show that the suits, *Austin* v. *Georgia*, were entered thereon." That fact could have no legitimate tendency to establish the point in controversy in this part of the case. The plaintiff had the benefit of his day book, in which his charges were, in fact, made.

In the next place, we think there was no error in the instructions which the court gave the jury. The parties were evidently requiring of the court a particular charge, in relation to defendant's liability to pay the plaintiff for his services; and we think the charge correct. The court told the jury that they must find the fact from all the testimony in the case. The plaintiff's objection to this is, that the conversation of the plaintiff and Mr. Allen, and the conversation of Mr. Allen and the agent of the town, were not proper to be considered in reference to the plaintiff's understanding in regard to the services which he had already rendered. But we think it was not improper for that purpose. The conversation was in the nature of an admission of an existing fact. The proposition of Mr. Allen that he would have the agent engage the plaintiff, in that suit, and the answer, or reply of the plaintiff to that proposition, might well be considered by the jury, while determining whether the plaintiff rendered the services, expecting to be paid for them.

The objection to the witness, Mr. Allen, on account of interest, is not well taken. It does not necessarily follow that Mr. Allen, in any event, would be liable to the plaintiff; but, were it so, it would be for his interest to fix the liability upon the town, and therefore he has no interest in the event of this suit, to which the plaintiff can with propriety except.

But the important question in this case, and the only one, in which this court have had any difficulty, is in relation to the want of a freehold qualification in one of the jurors. And upon this, the authorities are not entirely harmonious. The only disagreement is in relation to the time, and manner, of taking advantage of this want of qualification. In other words, must it be taken advantage of upon the chal-

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lenge of the juror, at the time of empannelling the jury? or may it be insisted on as a cause of setting aside the verdict? Our statute which was in force at the time of this trial, required jurors to be freeholders. But it has been said in argument, that this is merely directory; and the case of *The People* v. *Jewett*, 6 Wend. 386, is cited as authority to that point; and also that the only advantage that can be taken of it, is upon a challenge to the juror. I am not very well satisfied with the summary mode of getting rid of a statutory provision, by calling it directory. If one positive requirement and provision of a statute may be avoided in that way, we see no reason why another may not. But the case above cited, is not very direct authority to this point. That case was a demurrer to a plea to an indictment, alleging that one of the grand jurors who found the indictment, was not a freeholder. By a reference to the statute of N. Y. it will be seen that there was no specific requirement that grand jurors should be freeholders. In relation to petit jurors, it is otherwise. Our statute requires both grand and petit jurors to be freeholders. The want of that qualification, is a disqualification, and applies to the juror in one capacity as well as the other. The cause for which a juror is challenged, is supposed to apply to some disqualification of the juror to sit in that particular case, such as prejudice, expressed opinion, interest, or relationship to one of the parties; but these are no general disqualifications, affecting his capacity or legal right to be a juror in other cases. This being a qualification required by law, and the jurors being selected and returned by the officers of the law, without any interference of the suitor, he has a right to presume that none are returned, but such as possess the legal qualifications, and is not therefore bound to rely upon his challenge. All the remarks in the above case from Wendell, that are in point, and applicable to this case, are the mere expressions and opinions of the judge who delivered the opinion of the court, and had little or nothing to do with the question he was deciding. And the authority in the case from Kirby's Reports, 184, is of the same character—the *obiter dictum* of the judge.

The case in 1 Conn. 401, is better authority in this case, than the one from Wendell, or the case from Kirby. It

raises and discusses the same question that is involved in this case. In that case the court say, that "although this 'defect does not affect the capacity or moral qualification of 'the juror, and is strictly technical, yet the law is too positive to be dispensed with."

In *Fines* v. *Norton*, Cro. Car. 278, one Lambert was sworn upon the jury, but it turned out that his name was not in the *venire facias*, and for this it was held, that error would lie. We think there was much less reason for it than exists in this case. There was no pretence but what Lambert possessed every requisite qualification for a good and lawful juror, only that his name was not in the *venire*, and that if his name had been in the *venire*, he would have been unexceptionable. But the verdict, for that cause, was set aside. But, in this case, the juror lacked a positive qualification to be a juror in any case. In the case *Rex* v. *Tremaine*, 16 Com. L. R. the court say, "to support a judgment, it must be founded on a verdict delivered by twelve competent jurors." The verdict in this case was not rendered by twelve competent jurors, and the qualification which the juror lacked, was one that the wisdom of all civilized countries has deemed of importance; and one with which the statute law of this state, up to the time of this trial, had not dispensed; and, we regard the trial by jury, of such paramount importance, that too much care cannot be exercised in preserving all the safeguards which the law has placed around it.

New trial granted.

BENNETT, J. dissenting.

I cannot concur in the opinion of the court just pronounced, granting a new trial. Where the objection to a juror is such that it affects the fairness and impartiality of the trial, it should not be out of season, though advantage of it is not taken until after verdict. But should a verdict be set aside, simply upon the ground that one of the jurors was not a freeholder? The possession of a freehold estate is not such a qualification as goes to the character of the juror. It gives him neither mental capacity, unbiassed feelings, nor a virtuous purpose. The want of it, to a moral certainty, cannot prejudice the fairness of the trial. If a

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new trial is to be granted in such a case as this, it should be, I conceive, because "so are the authorities." I think reason, and the weight of authority are against it. In the case of the *State* v. *Babcock*, 1 Conn. R. 401, it is true the court granted a new trial, because one of the jurors was not a freeholder. But this was in a capital case; and though the rule should probably be the same in civil and criminal trials, yet this, evidently, had great influence upon the court. Until this decision, I understand, in Connecticut, the whole course of decisions had been to regard such objection only as matter of challenge. The court in *Gilbert* v. *Rider*, Kirb. R. 184, speaks of its having been, in point of fact, repeatedly adjudged, that the want of a freehold estate, though a ground of challenge, yet was insufficient after verdict. In *Sellock* v. *Turnpike Company*, 13 Conn. R., the case of the *State* v. *Babcock*, is evidently disapproved of, and if the court had found it necessary in the decision of that cause, it would, I think, judging from what is said, have been overruled. We have, in argument, been referred to a case in the Maryland Reports, in which the want of a freehold qualification in a juror was made the ground of a new trial. The opinion of the court is indeed laconic, consisting in saying, "a non juror is as no juror." This is about as satisfactory as it would be to say, "a juror is a juror." In the case of the *People* v. *Jewett*, 6 Wend. R. 386, it was held not to be a good plea to an indictment, that one of the grand jurors, who found the bill, was not a freeholder. In that case the court seem to think, that the authorities leave it somewhat doubtful whether a freehold qualification was necessary for a grand juror at common law. By the statute of New York, passed in 1827, (see 2 Vol. Revised Statutes, p. 720) it is made the duty of the supervisors, to select and place in the list for grand jurors, such men *only*, "*as they know, or have good reason to believe, are possessed of the qualifications, by law required* of *persons* to *serve as petit jurors*, and *are of approved integrity*," &c. The court consider this statute *merely directory to the supervisors*. The judge who delivered the opinion of the court, seems to suppose the law settled in New York, that though the statute requires a property qualification for a petit juror, yet a verdict will not be set aside simply for the want of it, though it was not

known to the party at the time of the trial; and much less, he says, ought it to prevail against an indictment.

In *Jeffries* v. *Randall*, 14 Mass. R. 206, a new trial was refused, where the party neglected to make the necessary inquiry of the juror, by which he might have ascertained the fact which would have disqualified him. This I think should be the rule, in all cases where the disqualification does not affect the fairness of the trial. Though *alienage* is a general disqualification at the common law, Coke Litt. 154–6, and is good matter for a challenge to a juror, yet in *Hollingsworth* v. *Duane*, 4 Dall. 353, and in *King* v. *Sutton*, 15 C. L. R. 252, new trials were refused for such cause. In the latter case, Lord Chief Justice Tenderton says, "he 'is not aware that a new trial has ever been granted on the 'ground that a juror was liable to be challenged, if the 'party had an opportunity of making the challenge." In neither of these cases did the party have notice of the ground of challenge. The disqualification, arising from *alienage*, does not affect the fairness of the trial. In *Gilbert* v. *Rider*, Kirb. R. 184, a new trial was moved for upon the ground that a juror had not taken the oath of *fidelity* to the state. The court held, however, that, if to serve as a juror, was "to execute an office," within the meaning of the statute, which it expressly prohibits any one from doing, until he has taken the oath of *fidelity* to the state, yet, as the juror was not challenged, the exception was waived, and came too late after verdict.

In *Hill* v. *Yates*, 12 East, R. 229, the father had been summoned as a juror, and the son by personating the father, served; yet, a new trial was refused. It is true, in the case of the *King* v. *Tremaine*, 16 C. L. R. 318, where an infant, under the age of 21 years, and who had not the property qualification, and had not been in fact summoned, personated his father, and joined in a verdict of guilty against a person indicted for perjury, the court held it was a mis-trial, and opened the case after verdict. The juror, in this case, had not attained the age at which the law considers him of sufficient capacity to judge on matters of this kind; and, consequently, in effect, it was the verdict but of eleven. Besides, the young man was not returned on the panel, nor was he summoned, and must be regarded as no juror at all.

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Some of the judges say he could not have been challenged. It was clearly a mis-trial. The case of *Fermor* v. *Dorrington*, Cro. Eliz. 222, and *Hasset* v. *Payne*, Ib. 256, in which it was held to be error, if one man be returned in the *venire facias*, and a different man in the *distringas*, who serves as juror, can have but little analogy to the question before the court. The *venire facias*, is directed to the sheriff, commanding him that he cause at least twelve *free* and *lawful men* to come, &c. Upon this writ it is not the practice for the sheriff to summon the jurors, but he returns the names of those he selects to serve as jurors, in a "*panel*" annexed to the writ, and they of course unavoidably make default in their appearance. Thereupon a compulsive process issues to constrain them to appear, called in the King's bench, a *distringas*, and in the common pleas, a *haebas corpora juratorum*. As the sheriff in England selects the jurors upon the *venire facias*, (a very responsible duty) we at once see the importance, that the process which compels their appearance, should return the same men. *Fines* v. *Norton*, Cro. Car. 278, is a case of the same description, which seems to have been pressed into the argument. If a person, not returned by the sheriff upon the *venire*, is brought in upon the *distringas*, he might have been added upon the suggestion of the plaintiff himself. In such cases I readily grant, there has been a mis-trial; and the judgments have been reversed upon error. We have no statute in this state, enacting that none but freeholders shall serve as grand or petit jurors, but it it simply directs the authority of the town to agree upon their proportion of *judicious and discreet freeholders* to serve as grand and petit jurors, who are to be nominated by the authority, and chosen by the town. The clerk, is to issue his *venire*, commanding the sheriff to summon such number of petit jurors as the court shall direct, being freeholders. The statute is silent as to what shall be the effect, provided one who serves as a juror is not a freeholder. This must depend upon reason, and the common law authorities. There is a well known distinction between what may be regarded as the essence of a thing required to be done by a statute, and that part of a statute which is *merely directory*. If our statute had expressly provided that a property qualification, should be indispensable for a

juror, it might, I think, with more plausibility be contended that such qualification was in the nature of a condition precedent, and that, without it, a person serving *de facto*, as a juror, should be regarded *de lege*, as *no juror*. In *Orcutt* v. *Carpenter*, 1 Tyler's R. 250, a new trial was moved for upon the ground, that one of the jurors was not a freeholder at the time of the trial, but it was refused. It is true, in that case it appeared the juror was a freeholder when put into the box, though not when summoned, or at the time of the trial.

The fact that he was a freeholder when put into the box could not alter the case. We should look to the qualifications of the juror at the time of trial. If he is then to be regarded as *no juror*, it is a *mis-trial*. All that the case now before the court finds, is, that the juror was not a freeholder at the time of trial. I had supposed this question, had been practically settled. While in the practice of law, I never knew such objection to a juror listened to as a ground of new trial, but uniformly treated as only matter of challenge. The objection does not affect the fairness and impartiality of the trial. It is the interest of the community and of suitors, that there should be an end of litigation; and to listen to this application is, in my opinion, fraught with evil, and, from inadvertance, and perhaps, in some cases, from design, it may prove a fruitful source of prolonging litigation. The legislature, however, at their last session, by abolishing the freehold qualification for a juror, have provided an antidote for all the evils, which I might fear, would otherwise flow from the decision now made. Admitting then, that the refusing a new trial for this objection, in the court below, did not rest in the discretion of that court, but may be reviewed in this court, upon exceptions, still I think the party can only avail himself of the objection, by way of challenge.

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Briggs & Edmonds v. Shaw & Thrall.

WILLIAM P. BRIGGS and EBENEZER EDMONDS v. HENRY SHAW and REUBEN R. THRALL.

(In Chancery.)

Chancery will not relieve against a judgment at law, when the matter set up, would have been a good defence, and would have been established by the same evidence at law, and when the orator has suffered a judgment to pass without attempting to avail himself of such defence.

Practice. This court will not, on appeal, direct any question of fact to be ascertained by a jury.

THIS was an appeal from a decree of the court of chancery against the orators.

The orators in their bill charged, in substance, that, in payment for 102 sheep purchased by them from the defendant, Shaw, they gave him their note for $375, dated September 19th, 1825; that subsequent to the execution of the note, Shaw agreed to receive from them, in payment thereof, wool from said sheep at a fair market price, to be delivered at Pontoosuck factory, in Lanesboro, Massachusetts; that, in September, 1826, they delivered at said factory 337 pounds of wool from said sheep; that, not agreeing on the price of the wool, the orators and Shaw agreed that Shaw should give for the wool the price which should be obtained for the wool grown on Shaw's farm that year; and that the wool was, thereupon, left at said factory. And the orators alleged that the price received for Shaw's wool, grown that year, was sixty cents per pound.

The orators further charged that Shaw did not apply said wool on said note, but subsequently transferred the note to the defendant, Thrall, for the purpose of collection, and that no consideration was paid by Thrall therefor; that Thrall brought an action on the note in his own name, and recovered judgment, and obtained execution thereon, and put the execution into the hands of an officer for collection; and that the orators paid the officer a certain sum on the execution, which sum, together with $115 paid on the note before the delivery of the 337 pounds of wool, and the said wool, at sixty cents per pound, amounted to the whole of said execution.

The orators prayed that the defendants might be perpetually enjoined from enforcing said judgment, until the amount

and value of said wool should be ascertained and applied—and for further relief.

The defendant, Shaw, admitted the execution of the note for the sheep, but denied that he agreed to receive in payment therefor, wool from said sheep, at any price. He admitted that in the summer or fall of 1826, the defendant, Briggs, brought 337 pounds of wool to said factory, but denied the alleged agreement to give for it the price which should be obtained for the wool grown on his farm that season, and alleged that he offered to purchase, and apply it on the note, at such price as should be agreed on between Briggs and Daniel Campbell, jr., agent for said factory,—and that, Briggs and the agent not agreeing on the price, the wool was left at the factory, where it still remained. He admitted that he received the sum of sixty cents per pound for the wool grown on his farm, in the season of 1826, and further admitted the transfer of the note to Thrall, without consideration, for the purpose of collection only.

The defendant, Thrall, in his answer, admitted the transfer of the note to him as stated by the orators; that he instituted a suit thereon in his own name, and recovered judgment and took out execution thereon, as alleged by the orators—which execution he put into the hands of the officer mentioned in the orators' bill. And he further alleged, that at the term of the court when said suit was entered, the orators appeared by their attorney, who obtained a continuance of the cause, upon the ground alleged by him, that the orators had a good defence to said action; and that, at the next term of the court, the orators appeared by their attorney, and voluntarily consented that judgment should be rendered against them; and the said defendant insisted that the orators had had sufficient opportunity to make their defence to the said action, and ought to have made the same at law.

The answers were traversed and testimony was taken. Among the witnesses who testified was Daniel Campbell, jr., referred to in Shaw's answer, and Boyd, whose testimony is referred to in the opinion of the court.

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C. Adams, for orators, contended that the suit against the orators could not have been defended at law, without proof that the wool had been received as payment. But whether actually received or not, if brought to the factory under an agreement to receive, it created a good claim in equity. The fact that this could not be made out without a discovery, shows not only, that the defence at law would be imperfect, but that chancery had jurisdiction.

It does not follow that, because chancery will aid a defence at law, by compelling a discovery, it must necessarily be made in that form. On the contrary, if a discovery is necessary, that gives the court jurisdiction; and having jurisdiction, they may examine the case and grant relief. Neither does the jurisdiction depend on the fact that a discovery is obtained.

Chancery will frequently take jurisdiction, even though the party may have a defence at law. It may depend on the nature of the case, the difficulty of making the defence at law, or the superior power of chancery to grant relief. It was on this ground that the suits between Dana & Nelson & Hall in our courts were determined. 1 Aik. 252; 2 Aik. 382.

Chancery will restrain a judgment at law, when a full defence could not be made, and when it would be unreasonable to enforce it. The ground on which chancery interferes is, to restrain a party from making an unjustifiable use of the judgment. *Hill* v. *Turner*, 1 Atk. 516; Mitford, 116, 119; 1 Mod. 130; *Strong* v. *McConnel*, 10 Vt. R. 231.

In the cases of *Lansing* v. *Eddy*, *Williams* v. *Lee*, and all that class of cases cited on the other side, it will be found that the claim made was without any equity, and the doctrine should not be extended beyond the facts before the court. And in this case, if the contract is established, it is decisive of the equity of the orators' claim, for if Shaw has received the wool under the agreement charged, it will be a case of flagrant injustice to allow him to enforce his judgment at law.

Lyman & Marsh, for defendants.

The matters charged in the bill, were as good at law as in equity; and if they be considered as proved now, might have been established by the same evidence upon the trial in

the action on the note. All the testimony shows previous notice to the orators; and equity will not relieve when defendant has suffered judgment to pass without availing himself of a defence which he might have made at law. *Loud* v. *Sargeant*, 1 Edwards, 164; *Lansing* v. *Eddy*, 1 J. C. R. 49, and cases there cited; *Smith* v. *Lowry*, 1 J. C. R. 320, 323; *Duncan* v. *Lyon*, 3 J. C. R. 351; *Barber* v. *Elkins*, 1 J. C. R. 465; *Foster & others* v. *Wood*, 6 J. C. R. 87; see also *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332; (2 Pet. Cond. Rep. 507); and *Stevens* v. *Tuttle*, 3 Vt. R. 519; *Loring* v. *Mansfield*, 17 Mass. 394; *Emerson* v. *Udall* 13 Vt. R. 477.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The orators, in this case, endeavor to establish, as a ground for the relief prayed for, an agreement made by the defendant, Shaw, with them, to receive wool in payment of the note, on which the judgment, in the name of Thrall, against the orators, was rendered. This agreement, together with the subsequent act of carrying the wool to the factory of the defendant, Shaw, was either a payment on the note, or an accord and satisfaction, and if either, afforded a complete defence to the action at law; and as judgment was rendered in the action at law, for the full amount of the note, and the orators were fully apprised of all the facts which were necessary to make that defence, or could have ascertained them, that judgment is a conclusive bar to this bill.

There is, moreover, a failure of proof, even if the judgment was not conclusive. The agreement is denied in the answer, and the testimony, to prove the agreement, is not sufficient to prove the agreement and the acceptance of the wool; but the acceptance is disproved by the testimony of Campbell and Boyd.

The application to submit the questions of fact, to the consideration of a jury, would not have been warranted by any principles, which govern proceedings in a court of chancery, even if it had been made to the chancellor; and this court, on the hearing of appeals, can never listen to any such application. The decree of the chancellor is affirmed with additional cost.

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Smith v. Pettingill *et al*

PHELPS SMITH *v.* JOSEPH PETTINGILL, CHARLES GRANNIS, and DANIEL ROBERTS.

(In Chancery.)

A court of chancery will not interfere by injunction, to prevent a mere trespass, when the impending injury is remediable by the recovery of damages at law.

Injuries to timber, ore, monuments, ornamental trees, coals, and quarries, have been held exceptions to this rule.

In a case of breach of contract, the court of chancery will not interfere, where the remedy at law is adequate.

THIS was an appeal from a decree of the chancellor, dismissing the orator's bill. The defendants severally answered, and the answers were traversed. From the bill and answers, it appeared, among other things,—

That, in November, 1839, the orator executed to the defendant, Pettingill, a lease of a certain farm in Milton for two years from the first of April then next; that it was stipulated in said lease "that, in case, there should not be, in 'either year of said time, in the estimation of said Pettingill, 'hay and coarse fodder enough raised upon said premises, 'by saving the whole of the same, in a prudent, husband-like 'manner, for the support of thirty cows, two oxen, ten 'calves, and one horse, the said Pettingill shall be at liberty 'to make up the deficiency by cutting upon the Colchester 'meadows, hay of an average quality with the whole mead-'ows, for that purpose, and to stack and to preserve the 'same there, until he may choose to draw it away;" and that Pettingill, on his part, covenanted to use, occupy, and manage the leased premises in a good, husband-like manner.

It further appeared that there was not, in the season of 1840, sufficient hay and coarse fodder upon the leased premises to keep the stock mentioned in said lease, and that Pettingill, not having placed upon said premises the quantity of stock in said lease specified, claimed the right to enter upon the "Colchester meadows" referred to in the lease, and cut hay enough to supply the deficiency upon the leased premises to keep the stock specified, and dispose of the same wheresoever he might choose, instead of removing it on to, and feeding it out upon, the said premises, which the orator claimed he was bound to do; and that, in pursuance of such

claim, Pettingill had sold a certain quantity of hay to be cut from said "Colchester meadows," to the defendants, Grannis and Roberts, who had carried away a part of the hay so by them purchased.

The orator prayed for an injunction to restrain the defendants from selling any hay from the "Colchester meadows," or using the same in any other manner than cutting and stacking upon said premises a sufficient quantity to make up any deficiency upon the demised premises, and removing the same to be fed out thereon.

J. Maeck, for orator.

Chancery will always restrain a tenant from doing an act, whether it amount to waste or not, when it is a violation of the tenant's covenant. Wheeler's Eden on Injunction, 184; *De Willon* v. *Saxon*, 6 Ves. 106; *Sir Wm. Pulteny* v. *Skelton*, 5 do. 147; *Ward* v. *Duke of Buckingham*, 10 do. 161; *Lathrop* v. *Marsh*, 5 do. 259.

If complainant has put the right construction on defendant's covenant, then the defendant, by going upon the Colchester premises and selling hay to be used off of the demised premises, was guilty of trespass, wilful waste and wilful breach of his own covenant; and courts of chancery, in modern times, interfere in matters of simple trespass where a relationship exists between the parties. The notion that the trespass must amount to an irreparable injury before they will interfere, is now exploded; and the following cases show that they grant injunctions in cases of trespass. *Field* v. *Beaumont*, 1 Swans. 208, and cases there cited; *Hanson* v. *Gardner*, 7 Ves. 305; *Mitchell* v. *Dorrs*, 6 do. 147; *Hamilton* v. *Worsefold*, cited in *Courthope* v. *Mapplesden*, 10 Ves. 290; *Thomas* v. *Oakley*, 18 do. 184; *Crockford* v. *Alexander*, 15 do. 138; 16 do. 128; *Kender* v. *James*, 17 do. 110; *Earl Cowper* v. *Baker*, 17 do. 128; *Gray* v. *Duke of Northumberland*, 17 do. 281; *Gustin* v. *Asplin*, 1 Mass. 150.

Allen & Platt, for defendants.

An injunction will not be granted in cases of mere trespass, but only in cases of waste or irreparable injury to the freehold. The taking off the annual growth is not such injury.

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An irreparable injury, and one which requires the aid of a court of chancery to prevent, is when a tenant for life or for years is taking off the timber trees, pulling down the buildings, or digging the land for mines, to the lasting injury of the freehold. *Kane* v. *Vanderburgh*, 1 John. Ch. R. 11; *Stevens* v. *Beekman*, do. 318.

Waste is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the injury of him who hath the reversion or remainder in fee simple. Co. Lit. 53.

But Smith may have his remedy at law. He is the owner, in fee, of the land, and in full possession, and may bring trespass. There is no term of years in the defendant, nor any intervening proprietor between him and the plaintiff, to prevent his action at law. In the case of *Stevens* v. *Beekman*, 1 Johns. Ch. R. 318, the motion for an injunction, was denied because the defendant, being a trespasser only, might be sued at law.

The opinion of the court was delivered by

REDFIELD, J.—It is not necessary to go into the question of the construction of the contract, as, in any view which can be taken of the case, the plaintiff must have an ample remedy at law, either in trespass for entering upon his land and cutting hay in a manner, and for a purpose, not within the fair construction of the contract; or else, for a violation of the contract, in cutting more hay than was necessary for the purposes for which the license was given, or for failing to apply it to the purposes therein contemplated.

But a court of chancery will never interfere to prevent, by injunction, a mere ordinary trespass where the injury would be in no sense irreparable, and where an adequate remedy might be found in the recovery of damages. Injunctions to restrain or prevent trespasses have been granted only when the impending injury was to timber, ore, monuments, ornamental trees, coals, and quarries. 2 Story's Equity Jurisp. 207–8–9, and cases there cited. In most of these cases, the recovery of damages merely, would be an insignificant or very inadequate remedy. The doctrine in regard to this subject is elaborately discussed and placed upon its true ground in the case of *Jerome* v. *Ross*, 7 Johns. Ch. R. 315. By reference to the cases there cited, it appears that the entire ju-

risdiction of courts of chancery in cases of trespass, is of very recent origin.

A mere breach of contract is never restrained in advance, or redressed, subsequently, in a court of equity, where the remedy at law is adequate to the injury. This case, in this aspect, is not very dissimilar to that of *Titus, Exec.* v. *Washburn*, 9 Kent. 211.

Decree of the chancellor affirmed.

WILLIAM R. LANE *v.* LEANDER MARSHALL, HENRY HODGES, and WILLIAM P. BRIGGS.

(In Chancery.)

Where the answer sets up matter of defence in avoidance of the bill, and the answer is traversed, this matter must be proved, independent of the answer.

THIS was an appeal taken by the defendants from a decree of foreclosure against the defendant, Marshall, upon a mortgage executed by him to the orator, on the 6th of April, 1833, to secure the payment of a note of hand for the sum of $300, payable in five years from that date, and against the defendants, Hodges and Briggs, as subsequent grantees of the same premises.

The defendant, Marshall, in his answer, alleged, in substance, that the mortgaged premises had been the property of seven children of Levi Lane, a *non compos mentis*, of whom the orator was one; that the orator, having purchased the rights of three of said children, conveyed to him, Marshall, his right in the premises, embracing four out of the seven shares therein; that the whole interest in the land was estimated to be of the value of $700, being $100 a share; that he paid the orator $400, being the value of the four shares thus conveyed to him, and gave the note mentioned in the orator's bill, for the remainder of the $700, and executed the mortgage mentioned in the bill, to secure the payment thereof; that on that occasion, the orator agreed to procure, and deliver to him, in a few days, a bond to be signed by Lyman Field and Erastus Field, conditioned that

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if the orator should not, within five years, procure and deliver to him the title of the said three other heirs, he should be saved harmless from the payment of said note for $300; that the orator had not procured said bond, and had not procured and delivered to him the title to said three other shares, by reason whereof, he was liable to be ejected from the premises.

The answer of Hodges admitted the execution of the deed from Marshall to Briggs and himself, and alleged that it was taken to secure them from a liability which had been discharged, and referred to Marshall's answer.

The answer of Marshall was traversed; no testimony was taken, and the case was tried upon the bill, answers and traverse.

W. P. Briggs, for defendants.

The questions arising on the merits of this case, are—

First—Is the answer of the defendant, Marshall, responsive to the bill? and

Secondly—If so, does it set forth a just and equitable defence to the orator's claim?

We insist that the answer is responsive in those particulars which deny the equity of the orator's claim.

The bill sets out the giving, and execution, of the note and deed, and charges that the note is justly due and owing to the orator; and in the interrogatories, compels the defendants to answer whether this is not the truth. The answer of the defendant, Marshall, (although not drawn with technical accuracy), states that there is no consideration whatever for the note, and denies that there is any debt due the orator. The story that the defendant, Marshall, tells about the agreement to procure a bond, &c., may not be responsive to the bill; but, certainly, the gist of the answer is, that the defendant has been defrauded, and that he owes nothing to the orator. The right of the defendant to make his answer evidence in his defence, must be co-extensive with his obligation to answer. *Woodcock* v. *Burnett*, 1 Cow. 711; *Smith* v. *Clark*, 4 Paige, 368; *Field* v. *Hallard*, 6 Cranch, 24. But there was, clearly, error in the court below in ordering a decree against the defendant, Hodges, who by his answer disclaims all interest in the premises, and therefore should have been discharged.

Hill and *Smalley* for orator.

The defendants, having admitted the execution of the note and mortgage deed set forth in the orator's bill, and not having proved the matter set up in avoidance of said note, the orator is entitled to a decree. American Ch. D., 403; *Hart* v. *Ten Eyck*, 2 Johns. Ch. R. 89; *Harrison* v. *Edwards*, 3 Litt. 352; *Bidinger* v. *Worley*, 1 Bibb, 195; *Gun* v. *Hart*, 1 Johns. R. 580; *Beckwith* v. *Butler et al.*, 1 Wash. 224; *Mott* v. *Harrington*, 12 Vt. R. 199; American Ch. D. by Wheeler, 334; &c.

Another reason why the orator should have a decree is, that the agreement set up in Marshall's answer, if true, cannot be proved by parol testimony, to alter the terms of the written contract. *Bradley* v. *Bently*, 8 Vt. R., 243, and the cases there cited. "The rules of evidence are universally the same in courts of law and courts of equity." *Mears et al.* v. *Anson et al.*, 3 Wils. R. 275.

The opinion of the court was delivered by

BENNETT, J.—This case goes to trial upon the bill, answers, and traverse; no evidence having been taken to sustain the answers.

If the facts set up by the answer as a defence, are not responsive to the bill, it is too well settled, to need authority, that the answer is no proof of such facts. The defendant, Marshall, claims, by his answer, that he purchased of the orator the seven shares of land which had descended to the seven children of Levi Lane, of whom the orator was one, at the sum of seven hundred dollars; of which he had paid four hundred dollars, and gave his note for $300, which note is the one now in question. The answer proceeds to allege, that the orator had a title to but four of the shares, and that, at the time of the purchase, the orator agreed with this defendant to give him a bond, with surety, to indemnify him against the outstanding title in the other three heirs; but that he had absconded without doing it, and that he was exposed to be ejected from the premises. The orator makes out his case by the exhibition of his note and mortgage, and the burthen of proof to impeach it, is upon the defendants; and when the defendant, Marshall, attempts, in his answer, to go into the facts set forth, with a design to show a want,

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or failure of consideration for this note, he departs from the bill. It is matter in avoidance, if any thing, of the orator's mortgage, and should be proved. Whether the facts set forth in the answer of Marshall could avail the defendants, if proved, it is of no importance to inquire.

The result is, the decree of the chancellor is affirmed, with additional costs, with the alteration, that the time of redemption be extended to the first day of August, 1843; and the case is remitted to the court of chancery to be proceeded with accordingly.

JOHN DEVERAUX *v.* AMOS B. COOPER.

(In Chancery.)

Courts of chancery adopt the same rules in the construction of writings, where there is no mistake or fraud, as courts of law.

D. sold to H. certain articles of personal property, in consideration that H. *had bound* himself, in a bond, to support D. and his wife, during their natural lives:

Held, that this was an executed consideration.

Chancery will not interfere where there is a remedy at law.

THIS was an appeal from a decree of the court of chancery.

It appeared from the bill and answer, that the orator, on the 17th of November, 1835, conveyed his farm to his son, Heman Deveraux, and took back a lease of the same, securing to himself and his wife, the possession and use thereof during their natural lives; that, in consideration of said conveyance, the said Heman executed a bond without surety, to the orator, conditioned for the support of himself and his wife, during their lives; and that, thereupon, the orator executed to the said Heman a memorandum as follows:

"Whereas Heman Deveraux has bound himself in a bond 'to support me, John Deveraux, and Mary, my wife, during 'our natural lives, I, on my part, bind myself to the follow-'ing agreement:—That Heman Deveraux is to have all my 'personal property that I own, and to have thirty-eight dol-'lars, annually, of my pension money, and to have it semi-'annually, as I draw; and that the sole, and only considera-

'tion for said deed of said land, and the above memoran-
'dum, was the said bond of the said Heman."

It was alleged by the orator that, at the time of the conveyance of said personal property to the said Heman, it was agreed between them that the same should remain in the possession of the orator on the said farm, and as appurtenant thereto,—which was denied by the defendant.

It appeared that, soon after the execution of said conveyance, lease and memorandum, the said Heman died, insolvent; that the defendant was appointed administrator on his estate; and that, upon a bill in chancery against the defendant, the title of the real estate had been decreed to the orator. It also appeared that, upon his appointment as administrator, the defendant, by order of the probate court, inventoried the personal property embraced in said memorandum, and that, having demanded the same of the orator, and the delivery thereof having been refused, he brought his action of trover for the same against the orator.

The orator prayed that the defendant might be perpetually enjoined from the further prosecution of said suit, &c. The case was tried upon the bill and answer.

Upon the hearing, the chancellor decreed the injunction prayed for.

The defendant appealed.

Wm. P. Briggs and *C. D. Kasson*, for defendant.

The case standing upon bill and answer, the latter is to be taken as true in every particular, whether it is responsive or sets up new matter.

1. The answer expressly denies that the conveyance was conditional, or that the personal property was to remain as appurtenant to the farm, but places the construction upon the bill of sale. J. & W., 422; 1 Ves. & B. 524; 1 Ch. Eq. Dig. 975–6.

These cases show that chancery adopts the rules of law in the construction of writings; and that where no fraud or mistake is alleged, the orator is estopped from alleging the agreement to be different from the writing.

2. There can be no doubt the bill of sale vested the property. If it did not vest the property, then the orator could avail himself of it in his defence at law. That being

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the case, this court will not relieve. *Emerson* v. *Udall*, 13 Vt. R. 477.

3. Will this court, then, under the circumstances, divest the property out of the defendant, and re-invest it in the orator? *First*, It is denied that, as matter of law, this court has the *power*. *Hunt's adm'r.* v. *Rousmaniere*, 1 Pet. R. 1; 2 Ch. Ca. 93. And, *secondly*, the whole case shows a superior equity in the defendant. 1. The orator has, by his own voluntary act, vested the property in the defendant's intestate, and laid the foundation for the order of the probate court. It is, therefore, fair to presume that, on the credit thus acquired, the debts were contracted, to discharge which the administrator claims the property. The orator's right, if any, is against the *estate*, and he should come in with the *general creditors*. 2. He seeks to claim the *whole estate;* thus giving *him, a particular creditor*, preference over the *general creditors*. 3. There is a high equity on the side of the defendant. He is invested, as *administrator*, with the *personal equity* of the deceased—the equity of the *general creditors*,—and has, moreover, that personal equity of his own, arising out of the fact, that by reason of the orator's own act, the property was the *legal estate* of the intestate, who died seized thereof, and which, by an order of the probate court, he was *compelled* to invoice and dispose of: and that, owing to the insolvency of the intestate (over which he had no control) he has expended large sums in settling the estate, and in the prosecution and defence of these suits of the orator, to an extent sufficient to swallow up nearly the whole fund in dispute. And this, without his fault. All has been occasioned by the orator's own act. The case is within the rule of the case of *Hunt* v. *Rousmaniere*, 1 Pet. R. 1.

4. The equities are, at least, equal; and, the legal estate being in defendant, he ought to prevail. 2 Ch. Ca. 213. Francis' Maxims, 72.

5. The case between these parties (11 Vt. R.) seemed to proceed upon the ground that the consideration of the deed operated as a trust estate. But we are aware of no case where a secret, undeclared trust has ever resulted out of the sale of personal property, as between vendor and creditors of vendee.

C. Adams, for orator.

I. The object was, maintenance of the old people, and compensation to the son for it.

II. The mode attempted for effecting it, was, granting reversionary interest in land to the son, and agreeing to transfer the personal property.

III. Construction.—*All* the papers are parts of one transaction. Deed and lease vested a life estate in the father, and remainder in the son. The agreement is *executory*, and therefore, the same thing is effected as to the personal property. If the old man's agreement transfers the legal interest in the personal property to the son, the son's agreement, in like manner, revests the same property in the father, during his life.

Performance by the son is a condition precedent; and before he could claim any interest in the personal property, he must have performed the whole condition of the bond.

IV. No consideration was paid by the son, and, therefore, a resulting trust was raised, that he should hold the property for the use of his father and mother, during their lives.

Bond not to be regarded, in equity, as a payment for the property, but as evidence of the trust, and limiting the extent of the son's liability.

Equity will consider that as done, which the parties have agreed to do; and, as the son agreed to provide lodging, clothing &c., for his parents, the court will hold the property as re-delivered to the old people, in fulfilment of his bond.

The property being conveyed to the son, upon a personal confidence, and the death and insolvency of the son rendering performance impossible, the court will decree a return of the property, unless the administrator will guarantee a performance of the son's undertaking.

Defendant can have no lien for expenses. He cannot claim as creditor; nor as purchaser, and, as representative, he can hold no greater right, nor interest, than the son could.

The opinion of the court was delivered by

HEBARD J.—This case was set down for trial upon bill and answer.

The bill alleges, and the answer admits, that the orator conveyed his real estate to his son, Heman, taking back a

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life lease to himself and his wife,—and that his son, Heman, obligated and bound himself to support the orator and his wife during their natural lives; and that the orator, in consideration that the said Heman had thus bound and obligated himself, made with the said Heman, the following agreement:—"That the said Heman is to have all my personal property that I own, and to have thirty eight dollars annually of my pension money, and to have it semi-annually as I draw: and that the sole and only consideration of said deed of said land, and the above memorandum, was the said bond of the said Heman."

The principal question in the case arises upon the construction of said memorandum or agreement. And in relation to that, there can be very little doubt. The sale of this property was upon an executed consideration. The property was not sold and delivered to said Heman, to be his, upon condition that he *should support* the said John and his wife, during their lives, but the sale was perfected; and the consideration of the sale was, that the said Heman *had bound* himself in a bond to support the said John and his wife during their natural lives. It cannot, therefore, be said that the consideration has failed, for it was as much performed as it would have been if it had been a promise for the payment of money, and that promise evidenced by the execution and delivery of a note of hand. By adopting this view and construction of the writing, there is nothing for chancery to do. While the law will relieve against the faults and frauds of others, it leaves every man to bear his own misfortunes; and considering the legal effect of this contract as vesting the title of this property in the said Heman, we have no power to reinvest the title in the orator. Nor would it be equitable to do so, if we had the power, under the circumstances of this case. The administrator, in the settling of the estate of the said Heman, has taken upon himself liabilities, and incurred expenses, for the liquidating of which, he relies upon this property; and the administrator should be protected while acting in the honest and legal discharge of his duty. But if, as is contended by the orator, the title to the property was not vested in the said Heman, a resort to the court of chancery was un-

necessary, as the orator's rights could be sufficiently protected at law.

The decree of the chancellor is reversed, and the bill is dismissed.

UZAL PIERSON v. GEORGE CLAYES, BENJAMIN HARRINGTON and LUTHER M. HAGAR.

(In Chancery.)

The right of a defendant in chancery to have his answer taken as evidence, is co-extensive with his obligation to answer.

When defendant, in answer to a bill, set forth a certain proposition in writing, made by him, and then stated conversations and facts to obviate and avoid the effects of the same, such conversations, &c., must be proved.

A court of chancery will open a decree of foreclosure when the failure of the mortgagor to pay, according to the decree, was not through his negligence or default, but in consequence of propositions of settlement and payment, to be carried into effect after the time of payment had expired, and the failure to perform was on the part of the mortgagee.

While a bill is pending to be relieved from the forfeiture for not paying the first instalment, the failure of the mortgagor to pay a second instalment, falling due while the bill is pending, is no obstacle to his obtaining relief.

THIS was an appeal from a decree of the court of chancery, dismissing the orator's bill.

The orator in his bill charged, in substance, that, on the 24th of June, 1836, he mortgaged a certain tract of land in Shelburne, to the defendant, Benjamin Harrington, to secure the payment of $1100, and that, on the 13th of October following, he mortgaged the same land to the defendant, Clayes, to secure the payment of $1600; that, at the August term, 1840, of the court of chancery in Chittenden county, Harrington, by his solicitor, Charles Russell, obtained a decree of foreclosure on said mortgage to him, by which it was decreed that the orator should pay the sum of $992.82, and interest, by the 12th day of September, 1841, and $400.80 by the 24th of June, 1842; that, immediately after filing said bill, Harrington assigned his interest in the mortgaged premises, to the defendant, Luther M. Hagar, who thereupon, executed an assurance to Clayes that he would release to him the said premises, in case the title should become absolute, under the decree; that, for the purpose of

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paying the amount of said mortgage to Harrington, and also the amount of the mortgage to Clayes, the orator entered into an arrangement with Henry S. Morse and Samuel Fletcher, by which they proposed to execute to Clayes, in satisfaction of both of said mortgages, their notes of hand, one for the sum of $1000, payable in the month of December, 1841, and another for $2000, payable in one year from that time; and that, on the 11th of September, 1841—the day previous to that fixed in the decree of foreclosure, for the payment of the first instalment—Morse addressed a letter to Clayes making a proposition to that effect, which was, by the orator, handed to him on the same day; that it was then and there agreed between the orator and Clayes that the notes of Morse and Fletcher should be so received by Clayes, and that the balance of said mortgages should be paid by the note of the orator, with surety; that thereupon Clayes addressed to Morse the following letter:

"'To Henry S. Morse. Dear Sir: I have received a line 'from you by Mr. Uzal Pierson, saying that Samuel Fletcher 'and yourself would pay me one thousand dollars in Decem-'ber next, and two thousand dollars more within a year from 'that time, if you can have the place clear—that is to say, 'Benjamin Harrington's and my mortgage discharged. The 'amount of Benjamin Harrington's and my own mortgage, 'including interest and cost, will be about thirty two hundred 'dollars.

'L. M. Hagar has obtained Harrington's quit-claim deed, 'and an assignment of all his interest. Hagar has agreed to 'deed all his interest to me, if the property falls into his 'hands. Then I shall be prepared to deed the same, by re-'leasing and quit-claiming all my right, title and interest to 'the same, on condition that I receive Samuel Fletcher's and 'your joint notes with interest from date, for one thousand 'dollars payable in the month of December next, and the 'balance, say about twenty two hundred dollars, within one 'year from date. GEORGE CLAYES.

'Burlington, September 11, 1841.

'I will endeavor to be at Shelburne, and attend to the 'business, on Tuesday next. G. CLAYES."

And the orator further alleged that, on the Tuesday mentioned in the said letter of Clayes, being the 14th of Septem-

ber, he, the orator, the said Morse and Fletcher, and the said Clayes met at Shelburne, and that Morse and Fletcher were then and there ready to execute their notes as aforesaid; that Clayes professed to be ready to receive the same and discharge the mortgages, but delayed until near the close of the day, and then proposed to continue the negotiation to the next day; but, as Morse could not attend on the next day, that it was agreed to meet on the 21st of the same September to complete the arrangement.

And the orator further alleged that the said parties met on the 21st of September, when Morse and Fletcher were ready to execute their notes for $1000 payable in December then next, and $2000 payable in one year from that time, and that the orator was ready to execute his note, with said Morse as surety, for the balance; but that Clayes, on inquiring whether Morse and Fletcher were to give the orator a written license to redeem the land which Clayes was about to convey to them, and learning that such license was not to be given, thereupon refused to receive said notes or to discharge the said mortgages, although he was then and there particularly requested by the orator so to do.

And the orator further alleged that, on the 24th of the same September, a writ of possession was prayed out in the name of Harrington, upon the decree, and that, thereupon, he was in danger of being dispossessed of said premises.

And the orator further alleged that, on the 6th of October, 1841, he tendered to the clerk of the court, making said decree, the sum of $1063 in payment of the sum so decreed to be paid on the said 12th of September, and also made a like tender to Charles Russell, Esq., the attorney and solicitor of said Harrington, he not being within the state.

Whereupon the orator prayed that the said decree, so far as related to the sum decreed to be paid on the said 12th of September, might be annulled, and further time allowed to redeem, &c., and for general relief.

The defendant, Clayes, in his answer, admitted the facts alleged by the orator concerning the mortgage to Harrington —the subsequent mortgage to himself—the decree of foreclosure—the assignment to Hagar, and the execution by Hagar of the assurance to convey. He also admitted that he received, on the 11th of September, 1841, from said

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Morse, by the hand of the orator, a written proposal for the execution of notes in payment of said mortgages, which was in the words and figures following:

"Mr. George Clayes. Dear Sir: Mr. Samuel Fletcher and 'myself will pay you, for Mr. Pierson, one thousand dollars 'in the month of December next, and the remainder of your 'debt against Pierson, to the amount of two thousand dollars, 'within one year from that time, if we can have the place 'clear—that is to say the B. Harrington mortgage and yours 'discharged, and have the place clear. If these proposals 'are accepted, you will send word, by Mr. Pierson, what day 'you will meet us at Hall's, and do the business.

'Shelburne, Sept. 11, 1841. H. S. MORSE."

And the said defendant alleged that, on reading said letter, he informed the orator that he should not accept of the proposition contained therein, as it embraced no stipulation for the payment of interest on the notes to be given; that the $3000 was less than the amount of the mortgages, and that he would not give the time of credit proposed; that, thereupon, the orator requested him to make a proposition to said Morse, whereupon he addressed to him the letter set forth in the orator's bill, and read, and delivered the same to the orator.

And the said defendant denied that, on the said 11th of September, or at any time before the expiration of the time for the payment of the first instalment in said decree, he made any agreement to accept the notes of said Morse and Fletcher for the sum of $3000, and the note of the orator with surety, for the balance of said mortgages, or that he made any other proposition than that contained in said letter to Morse. He also denied that, in proposing to defer the payment beyond the said 12th of September, or in fixing the time for executing the arrangement beyond that day, he had any intention to induce the orator to suffer the decree to expire; but, on the contrary, he alleged that at the time of delivering to the orator the said letter to Morse, he expressly said to him, that, unless the proposition thus made to Morse should be accepted before the expiration of the time for the payment of the first instalment, or the said instalment should be paid according to the decree, he, Clayes, would hold the land by virtue of said decree; that he then and there advised

the orator to ascertain immediately, and before the expiration of the decree, whether the said proposition would be accepted, to which the orator replied that he would so ascertain; and that the suggestion in his letter to Morse, of the time to close the business, was made at the orator's request, for the mere purpose of executing the necessary papers, in case the proposition should be accepted.

And the said defendant further alleged that he met the orator, and the said Morse, on the 14th of September, and informed them that he was ready to comply with his said proposition to Morse; that Morse said they would not accept said proposition, and would not give their notes for more than $3.000, and would not give them payable at so short a period as specified in the proposal, but that they would give them on interest; that, thereupon, Clayes proposed that he would take the notes of Morse and Fletcher with interest, for $3.000, payable at the times mentioned in the written proposition of Morse, and the balance of the two mortgage debts amounting to $150, in the joint note of the orator and Morse, or of the orator and either of certain other individuals, whom he named in his said answer; and that he and Hagar were ready, and offered to convey their right in the premises to Morse and Fletcher, on a compliance with said proposition, but that the orator neglected to effect such compliance.

And the said Clayes, further alleged that on that occasion, a question arose between the orator and said Morse and Fletcher, whether, upon the contemplated conveyance to them, a right to redeem was to be reserved to the orator, and that, on their declaration that no such right was to be reserved, the orator refused to go any further with the arrangement, or to procure or suffer the same to be executed.

And the said Clayes denied that Morse and Fletcher were ready and offered, on that day, to complete and execute the arrangement; and he also denied that he proposed or agreed to a postponement of the execution of it, to any future day, but admitted that, on the separation of the parties, in reply to a question by Morse whether he would agree to have the time to complete the business extended another week, he said that, if he should feel at the end of a week as he then

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did, he might do as he had proposed, but would not agree to extend the time or abide by his proposition at a future day.

And the said Clayes further alleged that, at the request of the orator made to him on the 17th of said September, he consented to meet him and Morse on the 21st, for the purpose of consulting upon the subject of an arrangement, concerning said land; and admitted, that, on that occasion Morse did offer to deliver to him, his and Fletcher's notes for $3.000 payable at the times specified in Morse's written proposition with interest, and also to sign with the orator a note for the balance, if he, Clayes, would convey the premises as had been proposed; that he did inquire if, in case such conveyance should be made, the orator was to have any right of redemption, or whether the title was to be absolute in Morse and Fletcher, and, that on being informed, that the orator would have no right to redeem, he declined to accept the notes and execute the conveyance, but alleged that he offered to execute it, and procure a release from Hagar if the orator could have the right of redemption.

And the said Clayes admitted that, on the 24th of said September, a writ of possession was taken out upon said decree, which was executed on the 2d of October following, by putting Hagar into possession of the premises; and that, on or about the 5th of the same October, Hagar conveyed to him, all his right, title and interest in the premises.

And the said Clayes alleged, further, that, no tender of the amount of said decree, or any part thereof, had, at any time, been made to him, nor to any one authorized by him to receive the same; and that he was informed and believed that no such tender had been made either to Hagar or Harrington, or to any agent or attorney of them or either of them, authorized to receive the same, or to any person to whom such tender might legally be made.

The answer was traversed, and testimony taken. The facts found from the testimony sufficiently appear from the opinion of the court.

C. Adams for orator.

It is not necessary that a contract should have been actually concluded by the parties before the 12th September, in order to lay an equitable foundation for vacating the decree.

Transfers by operation of law must be free from all personal interference. Any interference, by the party, inconsistent with the passing the estate by the decree, or any inducement held out, calculated or intended to relax the efforts of the orator to redeem, or which have had the effect to postpone the payment, will be sufficient to vitiate the decree.

It is evident the parties mutually made and received propositions which, if executed, would have had the effect of satisfying both mortgages. The letters of Mr. Morse and the defendant are conclusive of this. The letter of Mr. Morse, having been adopted and communicated by Pierson, is to be taken as his proposition. If the letter of Clayes was not an acceptance of the proposition contained in Mr. Morse's letter, it was, at least, a proposition naturally calculated to throw the orator off his guard, and did in fact postpone the payment.

If this proposition was made with a fraudulent intent, that alone would defeat all claim of title under the decree. If made in good faith, Clayes cannot hold the land, unless the failure of satisfaction was owing to Pierson wholly. It is no answer that he said during the negotiation, that he would not proceed, for it is clear that the negotiation was continued, and it distinctly appears, by the evidence of Mr. Morse, as well as by the defendant's answer, that, in the end, Pierson was ready, and offered to perform to the very letter, and that Clayes refused.

The legal effect of Clayes' proposition was: I will receive satisfaction in notes; you may take time to procure them; and if, in the end, the notes are not received, the money shall be received, *nunc pro tunc*. The proposition must have this latitude of construction, if it was made with an honest intention; and if not, his cunning will not aid him.

Again: The fact that Clayes' proposition for satisfaction of the mortgage was, by himself, refused, creates an implied right in Pierson to pay the money on the decree, in a reasonable time thereafter; and this, without any regard to the ground on which the refusal was founded, and without considering whether Clayes had any just grounds of refusal or not. The evidence is undisputed that the amount of the decree was tendered on the 6th of October.

In considering the case, all the propositions whensoever

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made, and all the acts and doings of the parties, are to be considered and construed as parts of one transaction. The matter will then stand on this wise. On the 11th of September, Pierson proposes to pay both mortgages by two notes of $3000. Clayes agrees to take the notes, but requires the interest to be included, and that a small balance, claimed to be due, should be added; and proposes a day for the execution, beyond the decree. The modification is accepted. Pierson proffers the notes in strict conformity to Clayes' terms, but Clayes refuses to take them and enters into immediate possession of the land. Clayes can take nothing by Piersons' failure to pay the sum decreed to be paid in June, 1842. Before that time, Clayes had taken possession of the land, and claimed to be the absolute owner of it, under the decree.

It is obvious that Clayes cannot hold the land for the non-payment of the sum decreed to be paid in September, 1841, and still claim the instalment decreed to be paid in June, 1842. The taking the land under a decree is a satisfaction of the whole decree; and it must have the same effect, whether the decree be for one payment or more. How far the taking the land without a decree is a satisfaction of the mortgage debt, is a different question; but that the taking of the land by virtue of a decree, operates to extinguish the decree is too plain for discussion.

The argument that we have lost the land by failing to pay the amount decreed to be paid in June, 1842, rests on the admission that the possession of Clayes was wrongful. Is it true, then, that a wrongful possession is not an improper interference with our right to redeem? It is a fraudulent attempt to prevent our redeeming, too barefaced to be tolerated, in a court of chancery. The case of *Smalley & Adams* v. *Hickok* has no analogy to this case. The right of redemption in that case, was gone; and it is not intimated that there had been any interference of any kind. The land had become absolute in Hickok, and he might well sell it.

G. P. Marsh & Hyde & Peck, for defendants.

All that appears from the case, prior to the expiration of the decree, is a proposition to Clayes, which he then refused to accept, and a proposition by him made at orator's request, to Morse, in the writing set forth in the bill, which was

handed to the orator, who was, however, at the same time told that unless Morse accepted the proposition before the decree expired, Clayes would hold the decree absolute. What took place after the decree expired has no operation upon the decree. *Smalley & Adams* v. *Hickok*, 12 Vt. R. 153.

The whole case shows that Clayes acted with fairness throughout, and was ready on the 14th September, after the decree expired, to vary his proposition, so that orator could comply, and that the orator refused to enter into any arrangement. The first proposition of Clayes' was never accepted. There is no evidence to show that orator was deceived and misled, or let the decree expire under any misapprehension or mistake, either as between himself and Clayes, or between himself and Morse. If the title has become perfect under the decree, without the fault of Clayes, the court have no power to divest it, merely from the misfortune, much less from the folly or negligence of the orator.

To open a decree, merely for an unsuccessful attempt at negotiation, would be establishing a principle detrimental to mortgagors, as no mortgagee would dare even to receive a proposition, or attempt a negotiation, even at the solicitation of the mortgagor. The attempted arrangement was wholly in the character of a purchase by Morse and Fletcher, in which the orator had no interest, and hence he suffered no injury, and cannot sustain the bill.

The orator must make such a case in proof, as he has made in his bill. He alleges a contract, and none is proved.

The answer on this point is responsive to the bill. Clayes was bound, not only to admit or deny the contract set up, but if he denied it, he was bound to go further, and state all that was said and done, that the court may see whether it amounts to a contract or tended to deceive or mislead the orator. The right of Clayes to use the answer as evidence, is co-extensive with his obligation to answer. *Woodcock* v. *Bennett*, 1 Cow. 711; *Smith* v. *Clark*, 4 Paige, 368; *Field* v. *Holland*, 6 Cranch, 24.

No tender has been made. Charles Russell, as solicitor to foreclose, was not authorized to accept the money after the decree expired, more especially as he had no agency *in*, or knowledge *of*, the negotiation. Orator had notice before the

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tender, that Hagar had a deed from Harrington, and Clayes a deed or contract from Hagar. See testimony of Ch's Adams, and Clayes' answer.

If the attempted arrangement saved the forfeiture on the first instalment, the title has become absolute by the nonpayment of the instalment falling due in June, 1842. *Smalley & Adams* v. *Hickok*, 12 Vt. R. 153. The attempt at negotiation can have no greater effect than a payment of the first instalment by orator and acceptance by Clayes.

The opionion of the court was delivered by

WILLIAMS, Ch. J.—The object of this bill is, to enable the orator to redeem a certain mortgage, executed by him to Benjamin Harrington, on which a decree of foreclosure has, heretofore, been made, in the court of chancery, and to open the decree for that purpose. It is stated that, in the year 1836, the orator mortgaged a certain tract of land in Shelburne, to the said Harrington, for the sum of eleven hundred dollars, and that, afterwards, on the 13th of October, 1836, he mortgaged the same land, with some other, to George Clayes, one of the defendants; that, at the August term of the court of chancery, in 1840, a decree of foreclosure, was obtained on the mortgage executed to Harrington, by which Pierson was decreed to pay the sum of nine hundred ninety two dollars eightytwo cents, by the 12th of September, 1841, and the residue, by the 24th of June, 1842. It is stated, that this mortgage became the property of the defendant, Clayes, and in consequence of a negotiation, between the orator, Pierson, and the defendant, Clayes, the amount due on the 12th September, 1841, was not paid; that the failure to complete the negotiation, was not on the part of Pierson, but on the part of Clayes. This bill Clayes has answered, and the answer is traversed.

A decree of foreclosure, according to our practice, is an absolute and final decree in the first instance; and unless the court of chancery could relieve against such a decree, when the mortgagor had failed to perform, without any fault on his part, and in consequence of the acts of the mortgagee, there would be a manifest failure of justice; and although the court would step with great caution in relieving a mortgagor from a decree of foreclosure, yet there may be circumstances

which would require them to relieve him from the forfeiture, when the mortgagee can be sure of receiving his debt. We think these circumstances exist in the case before us.

On the 11th day of September, 1841, Pierson carried to Clayes, who had control of the Harrington mortgage, a proposition from Morse, not only to satisfy that mortgage, but also the one to Clayes, a great part of which was not then due. To this proposition Clayes returned an answer, not accepting the proposition of Morse, but making another, not greatly varying from it, which is in the following words:

"To Henry S. Morse. Dear Sir: I have received a line 'from you by Mr. Uzal Pierson, saying that Samuel Fletcher 'and yourself would pay me one thousand dollars in December 'next, and two thousand dollars more within a year from that 'time, if you can have the place clear, that is to say, Benja- 'min Harrington's and my mortgage discharged. The amount 'of Benj. Harrington's and my mortgage, including interest 'and cost, will be about thirty-two hundred dollars.

'L. M. Hagar has obtained Harrington's quit-claim deed, 'and an assignment of all his interest. Hagar has agreed to 'deed all his interest to me if the property falls into his 'hands; then I shall be prepared to deed the same, by re- 'leasing and quit-claiming all my right, title and interest to 'the same, on condition that I receive Samuel Fletcher's and 'your joint note, with interest from date, for one thousand 'dollars, payable in the month of December next, and the 'balance, say about twenty-two hundred dollars, within one 'year from date. GEORGE CLAYES.

'Burlington, Sept. 11, 1841.

'I will endeavor to be at Shelburne and attend to the bu- 'siness on Tuesday next. G. CLAYES."

This proposition was, to receive the amount of both mortgages, and Mr. Clayes fixed upon a time, two days after the time fixed in the decree for the payment of the first instalment. It is very obvious that, if Mr. Pierson, after receiving this letter from Clayes, had immediately redeemed the mortgage, on the 12th of September, two days before the time Mr. Clayes had proposed to attend to it, it would have defeated that arrangement, and would have been inconsistent with the negotiation then going on, to pay to Mr. Clayes both of the mortgages.

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The answer of Mr. Clayes, stating his conversation with Pierson in relation to receiving an immediate answer, and that he should hold the land, unless his proposition was accepted and complied with, before the expiration of the decree, is not proved, and is not responsive to the bill. It is true the right of a defendant, to have his answer taken as evidence, is co-extensive with his obligation to answer; yet in this case, the proposition in writing, in the letter the defendant, Clayes, wrote to Morse, is very explicit, and these conversations, which are set up to obviate the effect of it, are not called for by the bill, and cannot be considered as proved by the answer, but must be proved by other evidence.

If the failure to comply with the proposition of Clayes, had been on the part of the orator, he would not have been entitled to any relief against the decree. A proposition for a settlement, or to give further time, or to substitute any other security, made by a mortgagee who has a decree of foreclosure, will not entitle the mortgagor to open the decree, unless, in order to carry it into effect, something is to be done, at a time after the day fixed for redemption; and not, in that case, if the failure to perform is on the part of the mortgagor.

It appears the parties met on the 14th of September, and Pierson then refused or neglected to complete the arrangement; but a further day, to wit, the 21st September, was then agreed on for the parties to meet on this negotiation, at which time all the propositions of Clayes were acceded to, and Clayes refused to ratify and execute the same. Immediately on this, Pierson took all necessary steps to preserve his property from being forfeited, and to tender and pay the amount then due; but, as the day of redemption had then expired, the clerk was not authorized to receive the amount, and discharge the decree.

There appears to have been no negligence on the part of Pierson; and it is very apparent, that, in consequence of this negotiation, and the expectation of settling both mortgages with Clayes, on the terms proposed by him, he has permitted the time fixed in the decree to expire, and if not relieved, the farm, worth, as estimated, from $2,500 to $5,000, will be taken in satisfaction of the mortgage to Harrington, and

leave him liable on the notes given to Clayes, for which the second mortgage was executed. In the case of *Williams* v. *Dale*, 3 Johns. Ch. R. 290, the chancellor gave relief in a case, where the equity was not as strong as in this case; and we think the orator should be relieved from the forfeiture, and the decree of foreclosure opened.

With respect to the failure of the orator to pay the second instalment, while this bill was pending, we think it cannot, and ought not to have any effect whatever. In the first place, it is not in evidence before us, that there has been any such failure. Nor is there anything, either in the bill, or answer, which would require taking any proof to that effect. And furthermore, while this bill was pending, the object of which was, to be relieved against the consequence of not paying the first instalment, it would have been neither consonant with equity or justice, that he should pay an additional instalment, while yet uncertain whether he could get any relief from the consequence of not paying the first. The decree of the chancellor, is, therefore, reversed, and it will be remitted to the court of chancery, to ascertain the sum now due on the mortgage to Harrington, deducting the costs of the orator in this court, and to permit the orator to redeem, on the payment of that sum, by a day to be fixed by him.

WILLIAM THARP *v.* GEORGE THARP.

(In Chancery.)

In cases where courts of law and equity have concurrent jurisdiction, and a claim is barred at law, it will not be suffered to be revived in a court of equity.

An account rendered and acquiesced in for a considerable time, will be conclusive upon the parties, the same as an account stated.

THIS was an appeal from a decree of the court of chancery, dismissing the orator's bill. The bill was brought to compel an account. The bill was answered, the answer was traversed, and testimony taken. From the bill, answer and testimony, it appeared, among other things, that, in the year 1800, William Tharp, then of Ireland, constituted William

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C. Harrington, of Burlington, Vermont, his attorney, with power to manage and dispose of certain estate which had been bequeathed to him by his brother, John Tharp, including the collection of sundry debts which constituted a part of said estate; that the said Harrington not accounting, satisfactorily to said William, the latter, on the 28th of September, 1802, constituted the defendant his attorney, with authority to dismiss and supersede the said Harrington; to call him to account for all moneys which had come into his hands as attorney of said William, and to manage and dispose of the residue of said estate; that in execution of the said power of attorney, the defendant, in the year 1805, effected a settlement with Harrington, in which it was agreed that Harrington should pay the defendant the sum of $2100, and that the defendant should, in consideration thereof, convey all the interest of the said William, in said estate, to the said Harrington; that, subsequently, and before the year 1808, Harrington paid to the defendant the said sum of $2100, and that the defendant, in the year 1809, executed a conveyance to Harrington according to the terms of said agreement; that the defendant, soon after said settlement, wrote to said William Tharp, giving him a particular account thereof, and that said William answered said letter, and expressed no disapprobation of the conduct of the defendant in said settlement; that the defendant, previous to the year 1811, made sundry remittances to the said William, and sundry payments in Vermont, for, and on his account, which, together with his commissions on the amount received, and remitted and disbursed, he alleged in his answer, was in full of all he had received as attorney for said William; that, in the year 1811, after the said account was closed, the defendant transmitted to the said William a full copy thereof; and that the said William did not, during his life time, make any objections thereto, or claim that the defendant had not fully accounted. It further appeared that the said William, on the 12th of May, 1819, made his last will and testament, therein devising to the orator all his estate, and that he died in the year 1821.

The orator alleged that the defendant had received from Harrington, moneys, goods, chattels, and choses in action, to the amount of ten thousand dollars—an amount greatly

exceeding that stated in the said rendered account of the defendant—which, the defendant in his answer, denied.

It further appeared that the orator had never had his domicil in this state, but had always been a resident of Ireland or of the province of Lower Canada.

The defendant, in his answer, alleged that his liability, if any, did not accrue at any time within six years next before the bringing of the bill, and might have been enforced, if at all, in a court of law.

Lyman & Marsh, for defendant, contended,

That the orator's right, if any, was barred by lapse of time, and the statute of limitations; and cited *Ellison* v. *Maffat*, 1 J. C. R. 46; *Arden* v. *Arden*, Ib. 313; *Mooers* v. *White*, 6 J. C. R. 360 (369); *Kane* v. *Bloodgood*, 7 J. C. R. 90 (111); *Ray* v. *Bogart*, 2 J. Cas. 452; *Chalmers* v. *Bradley*, J. & W. 62; *Spear et al.* v. *Newell*, 13 Vt. R. 288 (293);—

That William Tharp, the principal, having deceased, the orator could avail himself, personally, of no exception in the old statute of limitations, by way of successive disability; and cited *Wych* v. *E. J. Company*, 3 P. W. 309; *Eager* v. *Commonwealth*, 4 Mass. 182; *Doe* v. *Jesson*, 6 East, 80; *Bunce* v. *Wolcott*, 2 Conn. 27; *Demarest* v. *Wynkoop*, 3 J. C. R. 129;—

That, by the act of 1832, (Comp. of 1834, 57 & 58,) the exception of the statute, as to persons beyond seas, was repealed, and was not restored by the the Revised Stat. of 1839;—

That, it is well settled that courts of chancery adopt the statute in all cases where there is a concurrent remedy at law; and that, as George Tharp was liable to account at law, and the statute had run upon that form of action, it was too late to seek a remedy in chancery.

C. Adams, for orator.

The claim of the orator is not barred by the statute of limitations, because it is founded in a trust or confidence.

Both the Tharps are within the saving of the statute, as neither of them have ever had any domicil in this state.

This is not a case in which successive disabilities can arise.

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Successive disabilities plainly import disabilities succeeding each other in the same person, and in different persons succeeding each other. The same reason for the exemption of the first applies, also, to the second.

The orator's claim is not barred by any presumption from lapse of time. No presumption can be raised in cases subject to the statute of limitations. If they could, statutes of limitation would become nugatory. Nor can the presumption be raised in cases taken out of the statutes by the saving provisions of those statutes.

Presumptions are rather legal inferences drawn from established facts; as, from a long continued possession, the court will presume it was under a deed rather than that the possessor acted as a trespasser. But, in this case, there are no facts from which an inference can be drawn.

The defence arises not from any facts, or acts done, but from the negation of them; and the statute might be properly pleaded were it not that the case is taken out of it. *University* v. *Reynolds*, 3 Vt. R. 558.

The opinion of the court was delivered by

REDFIELD, J.—This being a bill in chancery to compel an account, in a case where a court of law has concurrent jurisdiction with courts of equity, if the claim is barred at law, it cannot be enforced in equity. This is a uniform rule. *Staniford* v. *Tuttle*, 4 Vt. R. 82. *Hall* v. *Hall*, 8 Vt. R. 156.

This claim is of nearly forty years standing, and the only ground of exception to the operation of the statute of limitations, is the fact, that the present claimant and his ancestor, in whose right he claims, have resided without the state and beyond sea. All claims of such persons, until the year 1832, were exempted from the operation of the statute of limitations in this state. At that time this exemption was repealed without any saving in favor of those even, whose rights, by the general terms of the statute of limitations, had already become barred; thus, in terms, at once extinguishing all such claims. It is not necessary, now, to inquire whether it could have been the intention of the legislature thus summarily to annihilate this class of claims, or how far, giving the statute its literal operation, is to be esteemed a contravention of the

United States constitution. It is sufficient for the present case, that, after the repealing of that exemption, and before the bringing the present bill, more than six years had elapsed, and thus the plaintiff's right had become effectually barred by the statute of limitations. This is a sufficient reason why this bill cannot be maintained.

There is one other point in the case, which seems to be equally conclusive. This defendant, it is admitted, rendered to the orator's ancestor a full account of his proceedings, as early as 1807, and transmitted to him a copy of his account current in 1811. The ancestor survived until 1821, with these accounts rendered, in his hands, and without any the least objection to their fairness and accuracy; and after his decease, until the filing of the present bill in 1841, twenty years more have elapsed, and no complaint is made by the heir. Under these circumstances, it would be wholly unprecedented for a court of equity to open the account. Mr. Justice Story, 1 Equity Jurisp. 501, says, "An account *rendered* shall be deemed an account *stated*, from the presumed approbation and acquiescence of the parties, unless an objection is made thereto in a reasonable time." And "a *settled* account will be deemed conclusive between the parties, unless some fraud, mistake, omission or inaccuracy is shown." This bill is not brought with any view to surcharge or falsify an account settled between the parties. That the time, which has elapsed since the account was rendered, is sufficient to bind the parties to it, as an account settled, is apparent. In *Murray* v. *Tolland*, 3 Johns. Ch. R. 569, 575, it is laid down "If a merchant receives a *stated account from abroad*, and keeps it by him, any length of time, e. g. *two years*, without objection, he is bound by it, and equity will not decree an account to be taken afterwards." The cases of *Ellison* v. *Maffat*, 1 Ib. 46, and *Moores* v. *White*, 6 Johns. Ch. R. 360, are to the same point. Also *Irvine* v. *Robertson*, 3 Rand. (Vir.) R. 549. Decree of the chancellor affirmed with costs.

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Thomas v. Warner.

HENRY THOMAS *v.* ISAAC WARNER.

(In Chancery.)

The orator must stand or fall upon the case made by his bill. The answer of the defendant cannot aid the bill, nor can the prayer for a specific relief, though, upon different allegations, the orator might be entitled to the relief prayed for.

This was an appeal from a decree of the court of chancery.

The orator in his bill, set forth and charged, among other things, that, on the 18th January, 1830, one Thomas Pate conveyed to the defendant, Warner, by deed of mortgage, a certain lot of land in Burlington, being five acre lot, No. 77, according to the plan of said town, to secure the payment of six notes of hand, of $200 each, payable, successively, on the 1st of April, in the years 1830, 1831, 1832, 1833, 1834, and 1835, with interest annually, at 4 per cent.; that, on the 17th of May, 1831, Pate conveyed the same lot to the orator, in fee; that the first of said notes of Pate to Warner was duly paid; that, at the term of the supreme court holden at Burlington, on the Thursday next preceding the first Tuesday of January, 1832, Warner filed his bill in chancery, and obtained a decree against Pate and the orator for the payment of $274.58 debt and cost, by the 1st of May, 1832—$232, by the second Tuesday of January, 1833—$224, by the second Tuesday of January, 1834—$216, by the second Tuesday of January, 1835—and $208, by the second Tuesday of January, 1836, with interest on each of said instalments, from the 10th of January, 1832, and that, in default of either of said payments, the equity of redemption in said premises, should be foreclosed; that on the 11th of June, 1831, Warner commenced his action of ejectment against Pate and the orator, to recover possession of the premises, and at the March term, 1832, of Chittenden county court, recovered judgment for the possession thereof, and for the sum of $61.66 damages, being for the rents and profits from the 11th of June, 1831, to the last of March, 1832; that, on the 4th of April, 1832, Warner took out a writ of possession and of execution on said judgment, by which Pate and the orator were ousted from the premises, and compelled to pay, and did pay, the said sum of $61.66, *before the 1st of May*,

1832; that the said $61.66, so paid, had never been applied upon any of the sums embraced in said decree; and that the mortgaged premises were, on the 1st of May, 1832, of greater value, by $400, than the amount then due, principal, interest and cost, on the said mortgage and decree.

And the orator further set forth and charged that, on the said 1st of May, 1832, he applied to Warner, and offered to pay him the amount so decreed to be paid on that day, if he would deduct therefrom the sum so paid on said judgment for rents and profits, or, if he would apply the same, on any portion of said mortgage debt,—but that he refused to do either, and insisted on full payment.

And the orator prayed, that an account might be taken of what was due for principal and interest, on the mortgage from Pate to Warner, and of the rents and profits of the premises, together with the amount paid by the orator to Warner on said judgment, for rents and profits, from the 11th of June, 1831, to the last of March, 1832, and that he might be permitted to redeem the premises by paying the balance, if any should be found due; or, in case the court should adjudge that the orator had been foreclosed of his equity of redemption in the premises, that, then, it would decree that Warner should pay the orator said sum of $61.66, and the interest thereon,—and for further relief.

The defendant, Warner, in his answer, admitted the execution of the mortgages, by Pate, to himself, and to the orator—the payment by Pate of the note due on the 1st of April, 1830—the obtaining of the decree of foreclosure in January, 1832, against the orator and Pate as described in the bill—the obtaining of the judgment against Pate and the orator in March, 1832, for the seizin and possession of the mortgaged premises, and for $61.66 damages, being for the rents and profits thereof—and that he prayed out a writ of possession against them on said judgment; but he alleged that he omitted to have the same executed, until the first day of May, 1832, for the purpose of giving them the whole time for the redemption of the mortgaged premises, allowed by the decree; but that, they having neglected to pay the first instalment in said decree, the writ of possession was executed by the delivery to him of the said premises, and the

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collection of the damages, so adjudged to him, for the rents and profits of the same.

And the defendant further alleged, that, neither Pate, nor any other person had ever paid said decree, or any part thereof, and that the statement in the bill relative to the offer to pay, on condition that the said $61.66, recovered and collected, as for rents and profits, should be deducted, was without foundation.

And the defendant further alleged, that, after the conveyance of the premises to him by Pate, on the 18th of January, 1830, and before the delivery to him of the possession thereof, under the said writ of possession, they were impaired and injured by neglect, and lessened in value, and that their value, on the 1st of May, 1832, did not exceed the sum $1,000.

And the defendant further alleged that the said sum of $61.66, claimed in the bill, was paid to him as part payment of his said mortgage debt, and that the same was paid above six years before the exhibiting of the orator's bill, and the service thereof; and he, thereupon, claimed that the orator was barred from any right of action therefor, by the laws of this state for the limitation of actions.

The answer was traversed, but no testimony was taken.

It appears that at the March term, 1841, of the court of chancery, in the county of Chittenden, it was ordered, that it be referred to a master to ascertain, and report the value of the said mortgaged premises, on the 1st day of May, 1832; and that, at the adjourned term of said court, holden on the 1st day of January, 1842, George K. Platt, master in chancery, reported that the said premises were, on the 1st of May, 1832, of the value of $1,200.

Upon the trial of the cause, at the term last mentioned, it was adjudged by the court, that the orator was not entitled to have said decree opened for the redemption of the premises; but it was decreed that Warner should account for, and pay to the orator, the said sum of $61.66, and the interest thereon, amounting, in the whole, to the sum of $97.42.

Maeck & Smalley, for orator.

C. Adams, for defendant.

The opinion of the court was delivered by

BENNETT, J.—The primary object of this bill is to enable the orator to be let in to redeem; and if the orator is not entitled to this relief, that he may have the amount of the judgment, recovered by the defendant against him, for rents and profits, at the March term of the county court, 1832, with the interest, refunded to him. The bill alleges that the collection of the execution, for the rents and profits, was *prior* to the expiration of the decree of foreclosure, and that the balance of the first instalment had been tendered.

The answer denies that there was ever any offer, at any time, to pay the decree, under any condition, whatever, but admits most of the other material facts in the bill. It admits the collection of the execution, but, as to the precise time when paid, it is somewhat equivocal; but we think, upon a fair construction, it is to be taken, that the payment was not until after the expiration of the decree. In the case of *Lovell* v. *Leland*, 3 Vt. R. 581, it was held, upon a full review of the authorities, that a foreclosure, and an appropriation of the mortgaged premises, to the use of the mortgagee, after the time of redemption had run, was, by operation of law, a satisfaction of the debt, provided the value of the estate was equal to the debt, and if not, a payment *pro tanto*. In the present case, the master has reported the value of the premises to be greater than the debt.

From this doctrine, it would seem to follow that the mortgagee, could not, subsequently, at his election, proceed at law upon his mortgage debt. The mortgagor might well defend against such an action; and, consequently, it would seem to follow, that it should not have the effect to open the foreclosure. In the case before us, the action of ejectment was commenced first in time, and the mortgagee had a right to the possession, and was entitled to recover for the rents and profits, after notice to the mortgagor to quit; and the prosecution of such suit could not have the effect to open the decree. If the execution had been collected before the decree had expired, and the orator had, before the forfeiture, tendered the balance of the decree, and it had been refused, it would have presented a different case. But as there was no tender, and the execution was not collected till after the forfeiture, it is quite clear that the mere recove-

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ry in the action of ejectment, cannot have the effect to open the decree. Indeed, even the collection of the damages, before the forfeiture, unaccompanied by a tender of the balance, I think, should not have that effect.

The counsel for the orator argue, that, if he is not entitled to be let in to redeem, still he should have the amount of the judgment refunded to him. The amount of the argument seems to be, that, if the execution had been collected before the decree had expired, the money would have been held in trust for the benefit of the mortgagor, to be applied on the mortgage debt; and, as the property foreclosed was, at the the time of the forfeiture, of greater value than the mortgage debt, the money, if collected after the decree had expired, (the debt having been satisfied by means of the mortgaged premises) was wrongfully collected by the defendant, and is held without consideration, and in trust for the orator. Though there seems to be weight in the argument, which, upon a proper bill, should receive the due consideration of the court, yet, as the bill alleges the collection of the execution to be *prior* to the expiration of the decree, and there is no pretence that there was any offer, before the forfeiture, to pay the balance, it is apparent that, in such case, the decree could not be opened, nor could the money collected be recovered back. As well might there be a recovery back of the amount, had so much been directly paid on the decree, before it became absolute. It was the party's fault that he did not pay the balance.

It is evident the bill was framed, in the main, with a view to be let in to redeem. The orator must stand or fall upon the case which he has made in his bill. The direct allegation, that the execution was collected *before* the first day of May, 1832, (the time when the decree expired) is material; and the answer of the defendant that it was afterwards, cannot aid the orator to recover upon a case not made by his bill; nor can the special prayer for this specific relief—the stating part of the bill not being adapted to it.

The result is, the decree of the chancellor is, for this cause, reversed, and there should be a decree of dismissal of the orator's bill; and the cause is remitted to the court of chancery, with directions to enter up the decree accordingly.

MARIAN WARD v. STEPHEN SHARP and LUCY SHARP.

(In Chancery.)

A witness may be compelled to give testimony, the tendency of which may be to subject him to pecuniary loss.

Payments made under an usurious contract, to an amount within that of the debt and legal interest, are to be treated as payments, generally, and in the case of a bill to foreclose a mortgage, may be insisted on by way of answer.

Practice. An orator, claiming as assignee of a mortgagee, cannot require a defendant to bring a cross bill for the purpose of joining the mortgagee. If that is necessary for the security of the assignee, he should see to it in the progress of the cause, and cannot take advantage of his own neglect.

When a decree is reversed on appeal by defendant, and the cause is remanded, with directions to pass an ultimate decree for orator for a diminished sum, the chancellor will be directed to deduct from orator's costs, the defendant's costs in the court above.

THIS was an appeal from a decree of the chancellor, in favor of the orator.

The bill was brought for the foreclosure of a mortgage, executed by the defendants, on the 25th of December, 1838, to William Ward, to secure the payment of a note of $800, with interest, and, by Olive Ward, executrix of the last will and testament of William Ward, assigned to the orator in part satisfaction of a specific legacy in said will.

The defendants alleged, in their answers, that they received but $768 as a consideration for said note—the difference having been reserved for extra interest of four per cent. thereon, for one year; and that, at the expiration of one year, when the note became payable, the said Olive, executrix, demanded, and received from the defendant, Stephen Sharp, a note for $32, as, and for, extra interest of four per cent. on said note, for the year then next ensuing—which note for $32, had been paid; and claiming, that said two sums of $32 each, be applied on said note, in the mortgage specified.

The answers were traversed, and testimony taken. Among the witnesses, was the said executrix, Olive Ward, who, it appeared, had acted as the agent of her husband in receiving the note of $800, and loaning the money for which it was given.

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It appearing that the said Olive was residuary legatee under said will, and that her interest would be affected by the deduction claimed by the defendants from the note assigned to the orator, in part of her specific legacy, it was objected by the orator that she was not compellable to testify, as the tendency of her testimony would be to subject her to pecuniary loss.

Allen & Platt, for the orator, contended that a witness is not compellable by law to testify against his interest, and cited Peake's Ev. 137–138, in n. *Bain* v. *Hargrave*; 1 Str. 406; 1 Phil. Ev. 377; *Moreau* v. *Lamb*, 7 Cow. R. 174; *Benjamin & Moore* v. *Hathaway*, 3 Con. R. 529; Swift's Ev. 77; *White* v. *Everest*, 1 Vt. R. 182.

If the late decisions in the English courts have been different from this, they have been founded not on the common law, but on the statute of 46 Geo. III. c. 37. See Stark. Ev. 2d part, 134.

They further contended that, if any thing above six per cent. was paid, the remedy was not against the orator in this suit—that when a statute has created a new right, and prescribed a remedy, the statute remedy must be pursued. 6 Dane, 589, sec. 9; *Smith* v. *Drew*, 5 Mass. R. 515.

To the allowance of the first sum, alleged to have been paid on the 25th December, 1838, they objected, 1. That this claim, coming under the statute of 1836, was barred—the right of action for its recovery being limited to one year from the receipt of the money; 2. That, by the same statute, which gives the right, and prescribes the remedy, the action must be brought by the person who paid the money, against the person receiving it, and that, therefore, the claim could only be enforced against Wm. Ward, or upon his decease, against Olive Ward, his executrix. And, as to the other sum, alleged to have been received as usury, they maintained that, if the execution of the note of $32, was to be regarded as payment of the unlawful interest, then, the claim for it was barred by the statute of 1836; but that, if it was the payment of that note in 1841, then it came under the operation of the revised statutes of 1839, p. 366, the effect of which would be, to restrict the remedy to an action against the executrix, to whom the money was paid.

C. D. Kasson, for defendants.

I. The objection to the competency of Olive Ward, as a witness, on the ground of interest, is untenable, on several grounds.

1. If interested at all, she is so by her voluntary act. The moneys received by her were received as agent, or servant merely; and, as such, she was competent; and her embezzling the funds shall not deprive us of her evidence. 1 Stark. 750–1.

2. She is admissible *ex necessitate*. She acted as the servant and agent of the holders of the claim. 1 Stark. 753, 767–8.

3. It does not appear that the interest existed at the time of examination. 1 Stark. 757, n.

II. Are the defendants, then, entitled to the application sought by the answer?

This court will compel the application of moneys paid pursuant to an usurious contract, though paid voluntarily. *Dey* v. *Dunham*, 2 J. C. R. 182; *Bosanquet* v. *Dashwood*, Cases temp. Talbot, 37; *Salmon* v. *Bennett*, 1 Conn. 552. Nor can the oratrix avail herself of the statute of limitations, without expressly pleading it in bar to such a claim set up in the answer. *Dey* v. *Dunham*, 2 J. C. R. 182–91; *Prince* v. *Heylin*, 1 Atk. 493.

A defendant is only driven to a cross bill when he seeks either a *discovery* from the orator or some specific *relief*. Story's Eq. Pl. 312–13–14, *et seq.*; 2 Sch. & Le. 11, (note.) 2 Atk. 57; *Fife* v. *Clayton*, 13 Ves. 425, 545.

But when the *matter of the defence* does not call for a *substantively different decree* from the one prayed for in the bill, a cross bill is unnecessary, and it may be proper for an answer.

Here the orator takes the decree sought, both in *form* and *substance*, limiting only the *amount*. The effect is a mere direction to the master as to the mode of making up his report. It raises no new case; it introduces no new matter; it simply defeats or annuls, or rather *satisfies*, a certain portion of the orator's claim.

The court will give us the necessary cost incurred in enforcing the application of these payments. 2 Atk. 61.

CHITTENDEN, January, 1843.

Ward v. Sharp et ux.

The opinion of the court was delivered by

REDFIELD, J.—A witness may be compelled to testify to facts, which will have such a tendency, in regard to the determination of the case, as, by consequence, to subject the witness to pecuniary loss. Such has long been the settled practice in this state. The better opinion is, that this was the rule at common law. A majority of the judges so determined, in the case of Lord Melville, on the question being proposed by the House of Lords; but some of the judges being of a contrary opinion, the statute of 46 Geo. III. ch. 37, was passed, to put the matter at rest, which may be regarded but as an affirmance of the common law.

In regard to the right of the defendants to the application sought, there can be no doubt. Payments made in pursuance of an usurious contract, to an amount within the debt and legal interest, are to be regarded as payments, generally, and in a bill to foreclose a mortgage, founded upon such contract, may be insisted on by way of answer. Lord Mansfield, in *Smith* v. *Bromley*, reported in note to Douglass, 197, in commenting upon *Tompkins* v. *Bennet*, 1 Salk. 22, fully recognizes this rule, in regard to the effect of such payments. See, also, *Dey* v. *Dunham*, 2 Johns. Ch. R. 182–191.

The orator claiming as assignee of the mortgagee, will not justify her in requiring the defendants to bring a cross bill, in order to join the executrix of the mortgagee. If there is any importance in joining the mortgagee in such case, it is for the security of the assignee, and he should see to that, in the progress of the cause in the court of chancery, and cannot take advantage of his own neglect in that particular.

The decree of the chancellor is reversed, and the cause remanded, with directions to deduct the payments made on account of usurious interest, and also to deduct the amount of the defendant's costs in this court, from the orator's costs in the court of chancery.

FRANKLIN COUNTY.

JANUARY TERM, 1843.

PRESENT HON. CHARLES K. WILLIAMS, *Chief Justice.*
" STEPHEN ROYCE, }
" ISAAC F. REDFIELD, } *Assistant Justices.*
" WILLIAM HEBARD, }

THE RELIGIOUS CONGREGATIONAL SOCIETY IN BAKERSFIELD *v.* JOSEPH BAKER and SILAS POTTER.

To maintain trespass, *quare clausum fregit*, the plaintiff must have either a title, or exclusive possession.

A meeting-house was built by an incorporated association by the name of the Union Society, for the use, exclusively, of the Religious Congregational Society;—*Held*, that the latter could not maintain trespass, *quare clausum fregit*, against a pew-holder, and another who occupied the pulpit on the Sabbath, and prevented them from performing divine service there.

THIS was an action of trespass for breaking and entering a certain meeting-house in Bakersfield. Plea not guilty, and trial by jury.

The plaintiffs, in order to support the issue on their part, introduced testimony tending to prove, that said meeting-house was built about the year 1830, and was, soon after, dedicated in the usual manner, and with the usual ceremonies adopted by that body of Christians denominated Congregationalists; that, from the time of the dedication down to the time that the alleged trespass was committed, the plaintiffs had uniformly held their meetings in said house, for religious worship, on the Sabbath and other occasions; that, during said time, they had hired and settled several clergymen over said denomination, and that, at the time of the alleged trespass, they had settled a Mr. Canfield over said society, who was then acting as an ordained clergyman among them, and had been, for about a year before; that said Canfield had uniformly held his meetings on the Sabbath for

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religious worship in said house, and that, on the same Sabbath on which the alleged trespass was committed, the said Canfield and his congregation intended to hold a meeting for worship in said house; that, on that Sabbath, before the said Canfield and his congregation had assembled at said house, and while it was empty, the defendant, Potter, took said Baker, who was a clergyman of the Universalist order of Christians, to said house, opened the door and went in, in the usual manner and without doing any actual damage to said house; that immediately thereafter, the people assembled to listen to the religious instruction of said Baker, and for religious worship, and that said Baker occupied the pulpit of said house and performed divine service on said day.

The plaintiffs also proved that, in consequence of the preoccupation of said house, by said Potter, Baker, and said congregation, on said day, the Congregational society were obliged to hold a meeting for worship at another house.

The defendants, in support of the issue on their part, offered in evidence the record of the constitution of a society or compact, formed in the year 1828, "by the name of the 'Union Society, for the purpose of building a meeting-house 'for public worship in said Bakersfield, according to the first 'section of an act for the support of the gospel, passed Octo-'ber 26, 1798"—by which record it appeared that the defendant, Potter, was a member of said society; and, it also appeared from the same record that the said house was "to be built exclusively for the use of the Religious Congregational Society in Bakersfield."

The defendants also offered in evidence the record of the organization of said Union Society, and of its various meetings and proceedings, and, among other things, of its by-laws, whereby it was provided that the funds for building said house should be raised by sale of the pews, and by subscription, if necessary; and also that no person should be a member of said society any longer than he should own a share in said house.

The defendants also gave in evidence a deed from Oliver Houghton to William Perkins and Comfort Barnes, members of said Union Society, and their associates, dated December 14, 1829, which deed conveyed the land on which said meeting-house was built.

They also gave in evidence four deeds, dated January 4, 1833, from Calvin Ewins, to the defendant, Potter, of pews in said house—said Ewins, as appeared of record, being the authorized agent of said society to deed the pews. They also gave in evidence a large number of deeds from said agent, to other persons, of pews in said house; and proved that persons now professing to be Universalists, owned pews in said house, to the amount of $1600, or more, and that they wished said house to be occupied for religious worship by the Universalist order of Christians, to which Potter, and said pew-owners, belonged, such a proportion of the time as their interest bore to the whole cost of the house.

The defendants also proved, that the defendant, Potter, was one of the building committee, originally chosen by said Union Society, and that, as such, he superintended and controlled the building of said house; that, soon after it was built, a lock was put on the outer door, and the key was committed to the defendant, Potter, as an officer of said Union Society, who had ever, thereafter, retained the same, though for a few years previous to the alleged trespass, he was not an officer of the said society. It appeared, also, that there was another key, kept by persons living nearer to said house, which had been mostly used, for several years previous.

The defendants also proved, that most, if not all of the repairs of said house, and alterations, had been made in pursuance of votes of the Union Society, and by subsequent contributions of individuals. They proved, also, that the Union Society uniformly held their society meetings in said house, and that preachers, of denominations of Christians other than Congregationalists, had, on three or four occasions preached there. It was proved, also, that the said meeting held in said house, by said Baker, was by the consent and approbation of said Barnes, and many other members of said Union Society, but not in pursuance of any vote of said society. It was, also, proved, that said Union Society always claimed to be the legal owners of said house, and to be in possession thereof, according to their constitution and by-laws.

There was no evidence tending to show that any person of the Universalist order had ever preached in said house,

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prior to said alleged trespass, or, that any instance of preaching in said house, by a clergyman of a different order from that of the Congregationalists, prior to said alleged trespass, had occurred against the will, or, without the consent of those of the Congregational order. The evidence tended to show, that, at the meeting in said house, on the Sabbath next previous to the alleged trespass, the defendant, Potter, gave notice that the defendant, Baker, would preach in said house the next Sabbath, and that this was at once forbidden by one of the congregation present.

Upon the foregoing evidence, the defendants contended,

1. That the Union Society were the legal owners of said house; that they had the legal right to the possession thereof, and by construction of law, were in possession of the same.

2. That the only interest which the plaintiffs had, was that of a *cestui que trust*; and being such, they could not, as a society, take and hold, actual possession of said house, and could have no constructive possession, as they had no legal title; and could not, therefore, maintain this action.

3. That the plaintiffs' right, in said house, was a mere incorporeal right, for an infringement of which, trespass was not the proper remedy, but case.

4. That the plaintiffs, being a mere *cestui que trust*, could not maintain trespass for an injury to the freehold, as against the defendants, but that the Union Society, or, the trustee, only, could maintain the action.

5. That, from the evidence, it was a case of *damnum absque injuria*, merely, for which no recovery could be had.

But the court decided against the defendants, on all the positions so taken by them, and ordered a verdict to be taken for the plaintiffs. Verdict and judgment accordingly. To which decision of the court, the defendants excepted.

H. R. & J. J. Beardsley, and *T. Child*, for defendants.

By the records and deeds in evidence, in this case, it appears that the plaintiffs are not the legal owners, vested with the legal title to the house, but that the "Union Society" have the legal title, and that the plaintiffs are but the mere *cestui que trust*. The plaintiffs, therefore, cannot maintain this action.

1. The "Union Society," having the legal title, are, by law, entitled to the possession, and are, in law, seized of the property. *The People* v. *Runkel*, 9 Johns. R. 147.

2. The plaintiffs, being the mere *cestui que trust*, having no legal title in the freehold, cannot maintain trespass. *The Duke of Newcastle* v. *Clark*, 2 Moore, 666; 1 Chitty's Pl. 51. The plaintiffs, as a corporation, cannot take possession in fact; and an occasional occupation of the house, for the purposes of worship, by some of the individuals composing the society, is not such a possession in the corporation as will sustain this action. 8 Johns. R. 363.

For any injury done to the house, the trustee must sue—which is, in this case, the "Union Society." Suppose a perfect stranger, in passing, had beat down the door, surely, the trustee must sue for the injury. The gist of the action is the injury to the house, and not for the disturbance of any right; for which latter act, case, and not trespass, should have been brought.

3. If the plaintiffs can sustain an action, it is case, for the interruption or disturbance of an incorporeal right, and not trespass for an injury to the freehold.

4. The defendant, Potter, being a legal proprietor in the house, had a right to enter peaceably and without doing any damage to the house, and occupy his own seat, and cannot be sued in trespass for so doing.

J. & J. G. Smith, for plaintiffs.

In relation to the first point in the case, urged by the counsel for the defendants in the court below, the plaintiffs contend—

1. That the "Union Society," having been legally organized, for the purpose of building a meeting-house *exclusively for the use* of the "Religious Congregational Society in Bakersfield," the deed of land, for the purpose of the erection of said house, to "William Perkins and Comfort Barnes, members of the Union Society, and their associates in said Society," was a trust deed, conveying the land to the Union Society in trust for the said Congregational Society, for the use and purpose specified in the constitution or compact of said Union Society, and for no other purpose.

2. That when the said meeting-house was built and *dedi-*

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cated, and when the Religious Congregational Society in Bakersfield had taken possession, the purposes of the trust estate were satisfied; and the Union Society, having no *right* to the possession, could not be considered constructively *in* possession. There is no provision or stipulation in the constitution or by-laws of the Union Society, by which it can be inferred that it was its purpose or intention to exercise any control over the house after it was finished. The Union Society, after the possession of the house by the Congregational Society, could not maintain either ejectment or trespass against the plaintiffs, or any person occupying the house under them, any more than a landlord could against his tenant during the term of the lease, or the grantor against the grantee, who had taken possession under his deed.

It appears, by the by-laws of the Union Society, adopted on the 14th of September, 1828, that none but pew-holders could be members of said society after the house was built; —that, on the 15th day of November, 1830, said society appointed Calvin Ewins an agent to deed pews, who, on the 4th of January, 1833, and after the plaintiffs were in possession, deeded said pews, as by deeds referred to in the case; that the *habendum et tenendum*, in each deed, was as follows, to wit: "To have and to hold the aforesaid pews, with all the privileges and appurtenances thereunto belonging, unto the said A. B., his heirs and assigns, *for the use* and purposes expressed and stipulated in the constitution and by-laws of said society, made and adopted, in relation to the building of said meeting-house, and the use to which the same is appropriated, and for no other use and purpose whatsoever." Hence it appears that all who took deeds of pews in said house, and who *alone* were members of the Union Society, held whatever interest they had in said house in subjection to the right of the plaintiffs, which was a right to the absolute and exclusive use of said house for *all* the purposes for which it was built, so long as the Religious Congregational Society in Bakersfield had a corporate existence. If the taking of deeds, as above mentioned, by all the individuals who constituted the Union Society, was not *ipso facto* a surrender of the legal estate to the Congregational Society, it is, clearly, a case where the law will *presume* a surrender to have been made.

This case comes within the principles laid down in 2 Leigh's N. P. 851–2–3, "That when the purposes of the trust estate have been satisfied, or when the *beneficial occupation* by the possessor induces a supposition that a conveyance of the legal title has been made, or when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance, a surrender by the trustees will be presumed, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover, even in an action of ejectment. This doctrine is fully sustained by the following cases: *Henderson* v. *Staple*, 2 T. R. 684; *Syburn* v. *Slade*, 4 T. R. 682; *Graham* v. *Scott*, 11 East, 478; *Byron* v. *Dearborn*, 8 East, 248; *Jackson* v. *Matsdorf*, 11 Johns. R. 91.

All the members of the Congregational Society became members of the Union Society, and it appears, by the terms of the compact of said society, that the house was to be built *exclusively for the use* of the plaintiffs. The title to the land had been secured, the house had been completed, and *formally* dedicated, and the plaintiffs were in full and peaceable possession. There were no further acts in relation to the house contemplated by the Union Society; there was nothing further for them to do. Hence we say that the trust estate was satisfied, when the plaintiffs took possession of the house—so much so, that a court of equity will compel a conveyance of the legal estate.

When a trust of land is *wholly nominal*, as in this case, the trust becomes executed in the *cestui que trust*, who may maintain ejectment in his own name, without any previous conveyance from the trustee. 21 Wend. 147. That the trust, in this case, was merely nominal, appears from the fact that the house was built for parochial purposes only, and exclusively for the use of the plaintiffs, and never could be rightfully used for any other purpose, or used at all by any other person or persons.

In relation to the second point urged by defendant, the plaintiffs contend:

1. That the Congregational Society, having been duly and legally organized prior to the organization of the Union Society, and to the execution of the deed of the premises, was a body corporate and politic, and could take, and hold, land

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and maintain trespass for any injury done to the *possession*.

If, in this case, the legal title has not, in *fact*, or by *legal presumption*, been surrendered by the Union Society, and if the Congregational Society be regarded as a *cestui que trust*, still, being in possession, this action can be maintained against the defendants, they being strangers. 1 Chit. P. 62.

It appears from the case that the plaintiffs, from the time of the dedication, in 1830, to the time that the trespass was committed, had been in the *actual* possession of the house—all the possession that the subject was susceptible of. This possession was sufficient to enable the plaintiffs to maintain trespass against strangers. 8 J. R. 366–7; *Green* v. *Cady and others*, 9 Wend. 414. If, however, it be true, as the defendants contend, that the Congregational Society cannot, *as such*, have *actual* possession, still, having the right of possession, the society were *constructively* in possession; and such a possession is sufficient to maintain trespass. 8 Johns. R. 366–7; 2 Leigh's N. P. 1438; 9 Conn. 216; 7 do. 232; 10 do. 225; 11 do. 260.

In England the possession of the church is in the parson, and he can maintain trespass against any person for preaching in his church, without his permission. 1 Leigh's N. P. 1441; 12 Mod. 420–33. In this country, the possession of the meeting-house is in the congregation, 1 Swift's Dig. 512, unless there is a statute provision, as in the state of New York, where the possession is in trustees. 9 Wend. 414; 8 J. R. 366–7. Whoever has the possession, actual or constructive, can maintain trespass. In Massachusetts it is well settled, that incorporated parishes can, *as such*, have the possession and maintain trespass for any unlawful entry into a meeting-house. *Inhabitants of Medford* v. *Pratt*, 4 Pick. 222.

In relation to the third point, it is contended by the plaintiffs that, having, not only the *actual* possession of the house in question, but, by the terms of the compact of the Union Society, the right of possession, their interest in the house cannot be regarded as an *incorporeal* right.

Their right was an absolute, unconditional right to the *actual* and *exclusive* possession for parochial purposes, and no more partakes of the character of an *incorporeal* right, than does that of a tenant in actual possession of land by

virtue of a durable lease. Sw. Dig. 104. But suppose it be true that the right of the plaintiffs is *incorporeal*, still, it is contended that trespass will lie for the infringement of it. 8 Johns. R. 366–7; Cro. Car. 201, 486; Dalton, 115.

In answer to the fourth point, it is contended, that the defendants were strangers to the title. They entered without permission, either express or implied, from either the plaintiffs or the Union Society. But if the defendants had showed a license from the Union Society, it would not have availed them, even on the supposition that the legal title had never been surrendered, for that society had no right to do any act that would have infringed or impaired the right of the plaintiffs in the free, absolute, and uninterrupted use of said house.

The damage done in this case was to the possession—and the Union Society having neither the *actual* nor *constructive* possession, could not maintain any action for injuries done to the possession. Hence, if the plaintiffs cannot maintain this action, the defendants or any other intruders may, at any time, and for any purpose, enter the house with impunity. It is contended, that any occasional use of the house by the Union Society, for the purpose of holding meetings, must be presumed to have been by the permission of the plaintiffs, as there is no provision in the constitution or by-laws of said society by which any right to hold society meetings in said house is reserved or secured. Such occasional use would not affect the exclusive character of the plaintiffs' possession.

As to the 5th point, the following familiar principle of law is applicable:—"A mere entry on land without lawful right 'is a trespass, though no actual damage be done, for the 'law will presume damage; and an entry into a house, 'though the door be open, if there be no consent of the 'owner." 3 Bl. Com. 209–10; Swift's Dig. 514.

Thus far the case has been examined on the part of the plaintiffs, as if this was a *trust estate*. But is it a trust estate? It appears by the terms of the compact of the Union Society that the house was built exclusively for the use of the plaintiffs. Hence, the house, or at least, the *use of the house* must be regarded as a *donation* from the Union Society to the plaintiffs. It could not be a trust estate, for no other person or body could receive the benefit

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of the donation. *First Parish in Sutton* v. *Cole*, 3 Pick. 238.

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The building of the house by the Union Society *exclusively for the use of the* Congregational Society, must be regarded as a *dedication* of the house to the plaintiffs; and being such, the plaintiffs can hold it, even against the Union Society. 3 Kent's Com. 450; *Town of Pawlet* v. *Clark*, 9 Cranch, 292; *Town of Chatham* v. *Brainerd and others*, 11 Conn. R. 60.

If the fee of the land is still to be regarded as in the Union Society, the plaintiffs, having the right to *the use of the house*, can maintain trespass. 1 Pick. 224; 4 Mass. 266.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This is an action of trespass, *quare clausum fregit*, for breaking and entering a certain meeting-house in Bakersfield. To maintain this action, it is necessary that the plaintiffs should have, either the exclusive possession of the *locus in quo*, or, be the owner thereof, and no adverse possession in any other person; and this will lead to the enquiry,—in whom was the fee of the place, &c., at the time of the alleged trespass? or, in whom was the fee, and, in whom was the possession? The plaintiffs are an organized society, or body corporate; and there is, also, another organized society, or body corporate, in the same town, by the name of the Union Society, who claim to be the owners of the meeting-house in question.

From an examination of all the papers in the case, it is evident, that the fee of the land, on which the meeting-house stands, as well as of the meeting-house, is in the association, formed under our statute, called the Union Society. In England, the soil and freehold of the church, is in the parson, who is a sole corporation. In this country, it depends on the contract and agreement which may be made when the church is built. Where parishes are incorporated, and churches are built for them, the fee is usually in them, as it commonly is, or was, in Massachusetts and Connecticut; and this must be the meaning of Ch. J. Swift, in his digest, where he says, the fee is in the congregation. The congregation, as such, are not capable of taking a fee. As many of our meeting-houses are now built, the fee may be in one corporation,

while the use, and enjoyment, may belong to another. In such cases, those, for whose benefit they are erected, and who are entitled to the use, and enjoyment of the same, cannot be disturbed, or interrupted therein, without having an appropriate remedy.

By the articles of association, and by the subscription, under which the meeting-house in question was built, the several pew-holders, from time to time, were the owners of the fee, and might be composed of different members from those which composed the other association, who, also, have a corporate existence, called the Religious Congregational Society. The Union Society, being the owners of the freehold, can, alone, maintain an action of trespass, *quare clausum fregit*, against any one, for breaking and entering the meeting-house, unless they have given to the latter society, the exclusive possession of the same. This they have not done, nor consistently with their articles of association, or by-laws, could they do. The several pew-holders had a right to their pews and seats in the house, of which they could not be divested, except by their own consent. The Religious Congregational Society are entitled to the use and enjoyment of the house for all religious purposes, for performing divine service, for prayer, for praise, for speaking and hearing the word of God, according to the usages and customs of a Congregational society; and if they are disturbed or interrupted therein, they have a remedy, but not by an action of trespass, *quare clausum fregit*. That the right to the use of a house for such, or similar purposes, will not enable them to maintain such an action, was fully recognized and established, in the case of *Milford* v. *Godfrey*, 1 Pick. 91. That the owner of a pew, cannot maintain such an action as this, was said by Buller, J., in the case of *Stocks v. Booth*, 1 Term. 428, and also, by Abbot, Ch. J., in the case of *Mainwaring* v. *Giles*, 5 Barn. & Ald. 256, although, it might, in some cases, be maintained in Massachusetts, where their statutes declare pews to be real estate.

The plaintiffs, however, contend that they are the *cestui que use*, and as such, are the owners, or occupiers of the house, and, that the court might direct the jury to presume a grant. The Religious Congregational Society, however, had not such a use, as would be executed by the statute of Henry

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VIII, and the possession transferred to the use, if, in any case, a corporation could be so seized of an estate in trust; nor could the court direct the jury to presume a grant, as the very object of the association of the Union Society, was, to secure to the several pew-owners their right and interest therein, and which would be defeated, if such a grant could be either made, or presumed. Neither did the dedication of the house make any alteration, either in the ownership, or possession, or change any of the rights, before existing therein. It recognized the right of the plaintiffs therein, but did not give them such an occupancy, or *possessio pedis*, as is always required and implied in the occupancy of real estate, to enable the possessor to maintain an action of trespass.

From the views already expressed, it appears that some of the requests of the defendants, to the county court, to charge the jury, should have been answered in their favor; and the direction should have been, that the plaintiffs could not maintain this action.

The judgment of the county court is reversed.

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Neither a mortgage nor pledge of, nor a lien upon, personal property can be available against subsequent attachments, without a change of possession.

An interest created by a pledge of personal property may be assigned.

TROVER for part of a mow of wheat. Plea, not guilty, and trial by jury.

On the trial in the county court it appeared that, on the 7th of January, 1841, the defendant took the wheat in question, as an officer, by virtue of a legal process against one Darius Heflon,—that said wheat was grown by said Heflon upon the farm of one Cynthia Russell, under a contract between them, that Heflon should carry on said farm for one year from the spring of 1840, and have half the crops raised thereon,—that Heflon lived in one house on said farm and the said Cynthia in another,—that, previous to the 22d of August, 1840, the plaintiff became bail, on an appeal for said Heflon, in consequence of which he became fixed with a liability for about $30, which he subsequently paid,—that

the said Cynthia came into an engagement to indemnify the plaintiff on account of said liability,—that, in consideration thereof, Heflon, on the said 22d of August, executed a writing to said Cynthia, therein declaring that he turned out and delivered to her the half of the crops then growing on said farm, belonging to him, to be taken and kept by her as security against said liability to the plaintiff—reserving to himself a right to thresh out four bushels of said grain for his own use,—and that said wheat was by the said Heflon harvested and put into the barn of the said Cynthia.

It also appeared that, soon after receiving said writing from Heflon, the said Cynthia intermarried with one Daniel Herrick, who, thereafter, lived with her on said farm;—that difficulties arising between Herrick and wife, and Heflon, upon mutual claims connected with the occupancy and carrying on of said farm, by Heflon, the matters were submitted to arbitrators, who awarded the payment of a certain sum to Heflon and that he should be allowed to remain in the house occupied by him upon the farm, until April, 1841, and have his firewood,—and that he did so remain; but whether he did any thing further in pursuance of said contract relative to carrying on the farm did not appear.

It further appeared that, on the 14th of December, 1840, Herrick executed a writing to the plaintiff, whereby, in consideration that the plaintiff discharged the indemnity so given him by said Cynthia, he, Herrick, assigned to the plaintiff all his right to said crops in virtue of said writing executed to the said Cynthia by Heflon—of which assignment it did not appear that Heflon had any notice.

It further appeared that the defendant sold said wheat upon execution, after advertising the same but thirteen days.

The defendant thereupon requested the court to charge the jury that the turning out and delivery, as security, by Heflon to Cynthia Russell did not authorize her to assign her interest in the property to any other person, and, consequently, the assignment by Herrick to the plaintiff was void, and conveyed to the plaintiff no interest in the wheat, and therefore he could not sustain the suit. But the court charged the jury that the assignment from Herrick to the plaintiff did convey an interest to him, so that he could sustain the action.

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The defendant also requested the court to charge the jury that if they believed the facts above stated, the defendant was entitled to recover on the ground that the turning out of the wheat from Heflon was fraudulent in law, as against creditors, as there had been no change of possession. But the court declined so to charge the jury.

The defendant further requested the court to charge the jury that, as Heflon still owned an undivided share of the wheat, to wit, four bushels, the officer had a right to take the whole into his possession; and that the plaintiff could not, therefore, recover in this action. But the court refused so to charge, but instructed the jury to deduct the four bushels which Heflon had the right to thresh for his own use.

The jury returned a verdict for the plaintiff, and the defendant excepted.

N. L. Whittemore, *Paddock* and *Peake*, for defendant.

The bill of sale from Heflon to Cynthia Russell was not assignable, without the consent of Heflon. It was not a security for a debt, and Herrick's assignment could not create any interest in the plaintiff, or any other person, until Herrick had been damnified. This had not happened at the time of the assignment, nor at the commencement of this suit. 2 Kent, 641–2; 4 Kent, 138. The property was pledged, and possession was essential to the lien. 2 Kent, 637.

The plaintiff cannot object to the defect in the notice given by the officer on the sale of the property, as no person but the party to the execution could take advantage of this irregularity. *Barnes* v. *Barnes*, 6 Vt. R. 394.

Heflon sowed, and raised the grain on shares, and harvested it, put it into the barn of which he had a lease, and consequently the exclusive possession; nor does it appear that any other person ever had the possession of the property. While it was thus situated it was attached by the creditor of Heflon.

Neither the plaintiff nor Herrick, nor any other person for them, had taken possession of the wheat. It remained where it had been, after it was harvested. Under these circumstances the sale was fraudulent, and the property was liable

to be attached by Heflon's creditors. *Beattee* v. *Robin*, 2 Vt. R. 181; *Weeks* v. *Wead*, 2 Aik. R. 64. Where personal property is mortgaged, the possession must accompany and follow the sale or it will be void against creditors.

The arbitration cannot affect Heflon's possession, as that subject was not submitted to the arbitrators. If they had decided that he should give up the possession, he would not have been bound to obey, because that question was not submitted to them. Nor does it appear that he surrendered the possession, but he remained on the farm as usual.

L. E. Pelton and *S. S. Brown*, for plaintiff.

The defendant has raised three questions in this case.

I. That the transfer of the property in question from Herrick to the plaintiff did not convey such a title to the plaintiff as would enable him to maintain this action.

The interest might be transferred, subject to the rights of Heflon. *Allen* v. *Edgerton*, 3 Vt. R. 442; 2 Kent's Com. 579, and cases there cited; Montague on Lien, 24.

Had the property been pledged for money, and the money not paid at the time specified, Herrick could have sold the property, Montague on Lien, 242. This pledge stands on a similar footing. If Herrick had paid the money, he could have sold the property and indemnified himself out of the sales. He could, therefore, transfer his lien in discharge of his liability.

Though the property was turned out to Cynthia Russell, who was back bail, yet the plaintiff had an equitable lien upon it, and had she been insolvent the court of chancery would have enforced that lien and ordered an assignment of the property to the plaintiff. Herrick could well do what the court of equity would order done.

II. The defendant contends that the transfer was a fraud in law against creditors, as there was no change of possession.

The contract to carry on the farm upon shares, gave Heflon no right to the possession of the buildings; and his right to the barn would only be implied from the necessity of using it to secure the crops. Suppose he had sold his share of the crops, and the purchaser had taken them away as fast as they were cut, and he had put only Cynthia Russell's

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part into the barn, could Heflon, in that case, be said to be in possession of the barn? Heflon conveyed his share of the crops to C. Russell, and when in the barn, the whole belonged to her, and she must be taken to be in possession. It does not appear from the case that Heflon owned any thing, either in, or about, the barn, or had any right there, except a right to thresh out four bushels of wheat; and this could not give him possession of the barn.

The agreement to carry on the farm on shares, made between the said Cynthia and Heflon, was terminated by the arbitration, which was before the attachment; and if Heflon ever had any possession, it had been ended by the arbitration, and Herrick was in possession of the property before it was attached by the officer.

In order to take advantage of a fraud in law, the officer must show his proceedings to have been legal; and this the defendant has not done, as he advertised the property only thirteen days.

III. The defendant contends that Heflon owned an undivided share of the wheat, and that the officer had a right to take the whole into his possession. The right that Heflon reserved to himself to thresh out four bushels of wheat did not make him and Cynthia Russell tenants in common. He turned out the whole, and his reservation did not vest any thing in him, unless he chose to exercise the right of threshing out the four bushels. If he did not, Cynthia Russell could hold the whole, and the creditors could not take it without paying off her lien, and then they could take the whole. If the officer took only the interest of Heflon, he took merely the right to thresh out four bushels of the wheat. The officer proceeded to sell the whole, and this made him a trespasser, even though Heflon might have been a tenant in common, and the officer had a right to remove the whole.

The case shows that Heflon had transferred all the grain growing on the farm, reserving only this right to four bushels, and the defendant did not show that Heflon had any other grain. This four bushels was, then, exempt from attachment by the statute, and the officer was a trespasser, as to Heflon, in taking it.

The opinion of the court was delivered by

REDFIELD, J.—In the present case it is not necessary to go into any nice learning in order to determine whether the contract between Heflon and Cynthia Russell, by which the plaintiff claims title to the property sued for, was a pledge or pawn, a mortgage, or a mere lien, as, in either case, the decision of the questions involved must be the same.

1. The question of possession. If it appear by the case, that the possession, in fact, remained in Heflon until the attachment by the defendant, it must be fatal to the case in either view. As a pledge merely, it could not be created without a change of possession, and would be lost by a surrender of the thing to the pledgor. The same is the law in regard to a lien, whether created by the usage of trade, by custom, or by express contract. A mortgage might exist between the parties, without any change of possession, as, in such case, the general property is transferred to the mortgagee; but, without a substantial and continued change of possession, it would be unavailing, as against creditors. It does not appear in this case, that the possession continued in the debtor, Heflon, and this court cannot presume it. Every presumption is in favor of the proceedings in the court below. Here, as every where, we presume *omnia rite acta*, until the contrary is made to appear. It would seem probable, from the case, that the debtor either never had the possession of the property, or parted with it long before the attachment.

2. The right of Cynthia Russell and her husband to assign. If this be a pledge or mortgage, by every rule of law, it is assignable. 2 Kent's Com. 579. And if it be but a mere lien, although that right will not pass by a general pledge, as was held in *Daubigny* v. *Duval*, 5 Term R. 604–5, *Newton* v. *Thornton*, 6 East, 17, and many subsequent cases, yet the mere transfer of the right of lien, as was done in the present case, is good. 2 Kent's Com. 639; *Urquhart* v. *M'Iver*, 4 Johns. R. 103. In the latter case the rule is thus laid down by Kent, Ch. J. "Though a factor cannot pledge the goods of his principal, *as his own*, yet he may deliver them to a third person, as security, with notice of his *lien*, and as his agent to keep the possession for him, in order to preserve that *lien*." The rule is laid down

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substantially the same in the last edition of the commentaries of the same learned judge. This is, now, doubtless the well settled law, upon this subject. *M'Combie* v. *Davies*, 7 East, 5. The rule seems to have been built upon the suggestions of Lord Ellenborough in this latter case.

But if it were necessary to discuss the point, it is obvious, that the present case is not that of lien, strictly and technically speaking, which is a security for some labor done or expense incurred in regard to the *very thing, in which the lien exists*. This is more properly a pledge, it being founded on the words "turn out and deliver." If a mortgage were intended, we should expect to find the parties using terms more indicative of an intention to transfer the *general* property. Chancellor Kent, 2 Com. 577, and Mr. Justice Story, on Bailments, 197, say, a pledge, or pawn, "is a bailment of personal property, as security for some debt, *or engagement*." That is the present case, and the assignment is to the one in equity entitled to the benefit of the security, and who might, in a court of equity, have compelled such assignment.

The license given Heflon to use four bushels of the wheat did not make him a tenant in common of the mass.

Judgment affirmed.

ROGER BIRNEY *v.* MARY BIRNEY.

A conveyance by a lessor, to one of two joint tenants, under a lease reserving rent, of all his title and interest in the premises, does not give the grantee a right to maintain ejectment against his co-tenant for non-payment of the rent accrued to his grantor.

EJECTMENT for a tract of land in Highgate. Plea not guilty, and trial by the court. It appeared on the trial that, on the 16th of March, 1824, Jabez Penniman executed to Anthony and Samuel Hoffman, a durable lease of a tract of land, embracing the premises in question, reserving an annual rent of $43, payable on the 16th of March, in each year, and providing, that if any part of the rent should remain unpaid for six months after due, the said Penniman, his heirs or assigns, might re-enter and take possession of the premises.

This lease was assigned by the Hoffmans to Timothy Birney in November, 1824,—by Timothy Birney, to the plaintiff, in 1826, and by the plaintiff to Michael Birney and James Birney in 1827. This last assignment, reserved a portion of the premises embraced in Penniman's lease, and contained a covenant on the part of the assignees, for the payment of the whole rent to Penniman, but contained no covenant that, in case of non-payment of the rent, the plaintiff might enter and take possession. In 1836 Michael Birney assigned his interest to the plaintiff, and in July, 1841, Penniman remised, released and quit-claimed to the plaintiff all his right and title, in, and to the premises.

It further appeared that the defendant was the widow of James Birney, and, with his children and heirs, continued to reside in the family mansion, and to occupy the land which he had possessed.

The action was commenced before the expiration of six months from the 16th of March, 1842.

The plaintiff contended that he was entitled to maintain the action, for the non-payment of rent, reserved in the lease from Penniman to A. & S. Hoffman; and also, on the ground that the defendant had not connected herself, by the evidence, with the estate of James Birney. The court rendered judgment for the defendant to which the plaintiff, excepted.

N. L. Whittemore, for plaintiff.

Roger Birney owns an undivided half of the land in question in fee simple, and is landlord as to the other half.

It is contended that the plaintiff can recover of the defendant the undivided moiety of this land, upon the non-payment of the rent, as his title is paramount to that of James Birney, or his heirs.

The purchase of the landlord's title by the plaintiff does not, under the circumstances of this case, enure to the benefit of his co-tenant, but he is in the same situation, as to that half, that the former landlord had been. Had the plaintiff owned this whole tract, absolutely, and then leased an undivided half to defendant, reserving rent, he could, upon the non-payment of the rent, have sustained his action for the land so leased, notwithstanding he might be tenant in com-

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mon as to the possession. This is the position in which, in a legal point of view, he is placed by the conveyances.

The deed of Roger Birney to James and Michael Birney, recognized the title of Jabez Penniman, and required the grantees to pay all the rent, both on the land in question and on the land which Roger Birney reserved to himself; and by force of that deed, the whole burthen of paying rent was thrown on to the land conveyed to James and Michael. The purchase of Penniman's title by the plaintiff could not injure his co-tenant, in case he complied with the conditions of the lease, by paying one half of the rents reserved, nor could it create any confusion in the payment of the rents, as he was bound to pay one half as they fell due.

The title of Penniman was not an adverse title; nor was it a foreign title to these tenants in common. The rule of law, that the purchase of a title by one tenant in common will enure to the benefit of his co-tenant, applies only in cases where an independent, latent, adverse, foreign title is purchased by one of the tenants; and it must be such a purchase as would be a fraud upon his co-tenant, and wholly defeat his title.

The title in Penniman was not inconsistent with that in the tenants; consequently one of the tenants might purchase it for his own benefit. If Penniman had purchased in Michael Birney's title, that would place him in the same position in which Roger Birney now stands. In that case, it is believed, that Penniman could maintain ejectment against the defendant for the non-payment of rent. Had this been a tenancy in common, say for ten years, reserving rent, the plaintiff could have purchased in the reversion on his own account, and it would not enure to the benefit of his co-tenant.

Where two hold an estate as tenants in common, supposing their title good, and, afterwards, one of the tenants discovers a defect, and purchases in an outstanding, adverse, latent title, it enures to the benefit of both. The case under consideration is far different. The plaintiff, by his purchase from Penniman, did not weaken nor impair the title of James Birney. His title remained as good and effectual after as before the purchase; and the co-tenant's interest in the estate was in no wise lessened, weakened, or abridged; and had the co-tenant paid his rents honestly he could not be disturbed in his possession.

It might present a different case had the tenants, before such purchase, believed they held the land free from rent-charge, and the plaintiff had discovered and purchased in the title of Penniman.

G. W. Foster, for defendant.

The plaintiff claims to recover, as the assignee of the original lessor, on the ground, that the defendant is his tenant, in possession of the premises sued for, and liable to pay the rent reserved in the original lease from Penniman to the Hoffmans.

The case shows that the parties were tenants in common of the premises. And that relation still exists, unless merged or destroyed by reason of the deed from Penniman to the plaintiff, of the 24th of July, 1841. If the plaintiff is to be treated as tenant in common, he should have proved an actual ouster by his co-tenant, to entitle him to recover, as the tenant in possession, is always presumed to be holding and occupying, according to his right; but no such proof appears in the case. And if the plaintiff is to be regarded as the landlord, then he must prove that he, in law, was entitled to the possession, at the time of the commencement of the action. The deed from Penniman would not convey to the plaintiff any title to the rents that had previously accrued. 1 Chit. Pl. 10; *Granby & Kellogg* v. *Wilcox*, 2 John R.; 2 Mass. R. 455, 439, 460; 14 John R. 89. Consequently, the plaintiff would not have the right, by the terms of the original lease, to re-enter till after the expiration of six months from the 16th day of March, 1842, which would be subsequent to the commencement of the present action. The first rent due to the plaintiff would fall on the 16th of March, 1842, and the right to re-enter by reason of the non-payment of rent is limited to six months beyond that period, or to six months after the rent falls due.

But the deed from Penniman to the plaintiff is, technically, a release, which enures, by way of extinguishment, as in the common case of a release of the rent by the landlord, to the tenant in possession, 4 Bacon's Ab. 284, title release; or, as the parties were jointly and severally bound to pay the rent, a release to one discharges the other. 4 Bacon's Ab. 266.

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The rent was an incumbrance, an annual charge upon the common estate. But one tenant in common will not be permitted to purchase in an outstanding title or incumbrance, and enforce it at law against his co-tenant. The purchase enures, in equity, to the common benefit, and the purchaser is entitled to contribution. The principle rests upon the privity between the parties, and the fidelity and good faith which the connexion implies. *Van Horn* v. *Fonda*, 5 Johns. Ch. R. 407; 4 Kent's Com. 371, in note.

The opinion of the court was delivered by

HEBARD, J.—The plaintiff seeks to recover possession of the premises in question, on the ground of the non-payment of the rent reserved in the lease from Penniman to A. & S. Hoffman, and the conveyance to him by Penniman, of all his title and interest in the premises. The first question is, can the plaintiff recover on the ground of the non-payment of the rent, which had accrued previous to Penniman's conveyance to him? That rent had accrued to Penniman, and not to the plaintiff. The purchasing in of the title from Penniman extinguished his right to the rent due, or at least his right to re-enter, and maintain ejectment for the non-payment of it. That rent had been equally due from the plaintiff, and James Birney, or his representatives; and as payment of any part of the rent thus due from the plaintiff and James Birney, would have enured to the benefit of both, so the payment, in effect, which was made by the purchase of Penniman's title, would enure to their common benefit. This action cannot, therefore, be maintained by the plaintiff, on the ground of the non-payment of rent which had accrued to Penniman.

It is equally clear that this action cannot be maintained for non-payment of rent after the conveyance from Penniman to the plaintiff, which was on the 24th of July, 1841, because, whatever liability for rent accrued after that time, it did not become due until the 16th of March, 1842, and, by the terms of the lease, the right of re-entry, and, of course, of maintaining ejectment for non-payment of rent, did not accrue until the expiration of six months from that time—previous to which expiration this suit was commenced.

So far as the case shows, the defendant is only holding

the premises for her children. It does not appear that she claims the land by purchase, or that dower in premises has been set out, or even that administration has been taken on the estate of James Birney. There seems, therefore, to be no ground on which this action can be sustained. There can be no doubt that those benefitted by the extinguishment of the back rent, can be compelled, in an appropriate action, to contribute to the plaintiff their proportion of it.

Judgment affirmed.

Administrator of JOSEPH BEEMAN v. THERON WEBSTER.

When service is performed in payment of a pre-existing debt, no recovery can be had therefor.

Quære.—Whether any recovery can be had, by an administrator, in an action pending at the decease of his intestate, when the defendant has presented a claim to the commissioners on the estate of the deceased, and they have allowed him the same, without any objection by the administrator against their proceedings.

THIS was an action of book account, originally brought by the intestate, before a justice of the peace, from whose decision there was an appeal to the county court, where a judgment to account was rendered, and an auditor appointed, who reported as follows:

"The plaintiff presented the account, which is annexed to 'this report, (marked plaintiff's account,) and the original 'book of Joseph Beeman, deceased, on which the charges 'were made by the said Beeman. The plaintiff, the defend-'ant, and their respective witnesses, were sworn and exam-'ined, and, from their testimony, the auditor reports the fol-'lowing facts.

'1. That items 3 and 4, in plaintiff's account, ought not 'to be allowed—item No. 3, never having been properly 'chargable to defendant, and item No. 4, having been paid 'for by defendant to the plaintiff, in his life time.

'2. As to items No. 1 and 2, he finds the following facts, 'that, at the time these services were rendered, by the 'deceased to defendant, it was agreed that the said Beeman 'should be paid therefor, by a "provision box," and that 'previous to the rendering of the services by the deceased,

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'he had the provision box of the said defendant, and, in consideration thereof, rendered the services charged. That after the death of the said Joseph Beeman, the defendant presented to the commissioners on his estate, the account annexed, (marked defendant's account,) and the same was allowed by the commissioners, as appears from their allowance, on the back of the account, and a report thereof, by them made to the probate court, and duly accepted by the court. The defendant, at the time he presented the account to the commissioners, stated to them, verbally, that the charge, No. 1, for a "provision box," was, as he understood, to offset to a charge which he supposed would be brought against him by the estate of the deceased, for his services in carrying him, (the defendant,) to Shelburne Point. But as no such charge on behalf of the estate was before the commissioners, the said item for the "provision box," was included in the allowance by the commissioners. The plaintiff, also, proved, (the defendant objecting thereto,) that, before the time of the audit, but after the commencement of this action, the plaintiff tendered the defendant, the sum of $3.26, being the amount of defendant's account allowed by commissioners, with legal interest thereon, to the time of the tender, and the plaintiff also presented the sum so tendered, in court.

'The defendant also offered, in offset to plaintiff's account, the allowance of his account, by the commissioners, as aforesaid, and claimed to have the sum so allowed offset to the claim of the plaintiff, if any part of the same should be allowed by your auditor, and judgment in his behalf, for the balance. The defendant, also, proved the account so allowed by the commissioners, to be a just account, and claimed to have the same set off, as an account, and not as an allowance by the commissioners.

'The defendant also proved an allowance by the commissioners of the said estate, duly accepted by the probate court, in his favor against the deceased, of $2.65, (as will appear from the execution and allowance annexed to this report) on an execution in his favor against the deceased, and claimed to have the same set-off against the plaintiff's account. The defendant also claimed said allowance as an account, and that he had a right to have the same set off

'as an account. The auditor also finds, that this suit was 'pending at the time of the allowance by the commis- 'sioners as aforesaid, and, indeed, was commenced by the 'said Joseph Beeman in his life time.

'If, from the preceding facts, the court should be of 'opinion that the items No. 1 and 2, in the plaintiff's account, 'can be legally allowed him, the auditor would report that 'they ought to be allowed at the sum of $1.25, that being the 'just value of the services rendered.

'The auditor would beg leave to submit to the court the 'questions of law arising from the facts found as aforesaid. 'He deems it unnecessary also to report what sum should 'be found due the defendant, in case the claims presented 'by him, or either of them, should be allowed as off-sets or 'accounts, inasmuch as that is merely a matter of compu- 'tation, depending upon the decision which the court may 'make on the questions of law; the said claims being justly 'due the defendant.

'The auditor would further report that Beeman, deceased, 'at the time he rendered the services, (No. 1 and 2) made 'the charges for the same on his original book as they ap- 'pear on his account annexed, and credited the provision 'box at 50 cts.; and that defendant also made a charge of the 'provision box on his original book, leaving the sum blank; 'but the time when the defendant made such charge did not 'appear."

Plaintiff's Account.

Theron Webster,

To Joseph Beeman, Dr.

1.	Feb. 14th 1837. To conveying you and chest of tools to Burlington,	$0.75
2.	" 15th. To carrying you and tools to Shelburne Point,	0.50
3.	Feb. 1838. To part of journey to Brasin, N. Y.	3.00
4.	" 20th, 1840. Half bill of costs you agreed to pay, myself v. you,	0.31
		$4.56

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Defendant's Account.

Joseph Beeman, Dr.

Feb. 1837.	To one provision box,	$0.75
	To one jug,	0.25
	To repairing cutter,	2.00
		$3.00

On the back of an execution in common form, (*Theron Webster* v. *Joseph Beeman*) the commissioners say "allowed by commissioners, June 30th, 1841, two dollars and sixty-five cents."

Upon this report, the county court rendered judgment for the plaintiff, to which the defendant excepted.

H. R. & J. J. Beardsley, for defendant.

Judgment on the report should be entered up in favor of the defendant.

1. Because there are no items in the plaintiff's account upon which he can legally recover. *Stevens* v. *Tuttle*, 3 Vt. R. 519; *Slasson* v. *Davis*, 1 Aik. 73; *Loring* v. *Mansfield* 17. Mass. R. 394.

2. Because the defendant's claims should have been allowed in off-set to the plaintiff's account.

——— ———, for plaintiff.

From the facts disclosed in the report, it is clear the defendant could charge the box on book; and the rights of the parties in this respect, must be reciprocal. The box was delivered before the services were performed. This created a debt or obligation, which was to be discharged by the services of the deceased, and he could well charge the article, and, if not paid for, as agreed, the defendant could recover pay for it in an action on book. The special agreement would not affect his right to recover. *Newton* v. *Higgins*, 2 Vt. R. 366.

The defendant charged the box and presented it for allowance before the commissioners, and it was allowed to him, without objection, and he cannot now object to the plaintiff's charge as illegal. *Barlow* v. *Butler*, 1 Vt. R. 146; *Farrar* v. *Gage*, 3 Vt. R. 326. If the plaintiff could not have legally charged the services, yet, as the defendant charged the box on his original book, this would legalize the charge.

Case v. *Berry*, 3. Vt. R. 332; *Jennison* v. *Bancroft*, 11 Vt. R. 490.

Admitting that the services could not have been properly charged on book, yet, as both parties have, from the beginning, treated the subject-matter of accounting, the charge for services may well be sustained. *Chellis* v. *Wood*, 11 Vt. R. 466.

Can the defendant's offset be allowed? The auditor could only take into consideration claims that were a subject of adjustment. Rev. Stat. 220, sec. 9. The claim the defendant offered in offset, had become a judgment debt. The adjudication of the probate court was conclusive upon the parties, and could not be inquired into, by the auditor, and, therefore, was not a subject-matter of adjustment. *Bates* v. *Kimball, admr.* 2 D. Ch. 77; *Atherton, admr.* v. *Flagg*, 2 D. Ch. 61; *Probate* v. *Fillmore*, 1 D. Ch. 423.

This suit was pending at the time of Joseph Beeman's decease, and it was the duty of the administrator to enter and prosecute, and he could not, consistently with that duty, enter a nonsuit, and present the account before the commissioners. Rev. Stat. 279. sec. 16.

The defendant had his option, either to plead his account in offset, or to present it to the commissioners for allowance. He has chosen his tribunal and must abide the consequences. Rev. Stat. 279, sec. 16.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The auditor reports, in this case, that the two items of account, for which the plaintiff now asks a judgment, were for services performed by the plaintiff in payment for a provision box before that time had of the defendant by the plaintiff. On this ground no recovery can be had therefor. The principle that services performed, or goods or money advanced, or delivered, in payment of a pre-existing debt, cannot be the ground of an action on book, or any other action, has been so often asserted by this court that it would seem the subject should be at rest. The cases of *Slasson* v. *Dvais*, 1 Aikens, 73; *Stevens* v. *Tuttle*, 3 Vt. R. 519, and *Downer* v. *Frizzle*, 10 Vt. R. 541, which is the very case before us, have settled this principle, and are conclusive of this case.

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There is another ground, which, in my view, would be equally fatal to any recovery in this case, for a balance to either plaintiff or defendant. Where a person deceases and his estate is represented insolvent, it is contemplated that all mutual claims between the deceased and any one claiming to be a creditor, should be adjusted by the commissioners and the balance ascertained; or, if a suit is pending in favor of the deceased, which the administrator or executor thinks proper to proceed with, or if the administrator thinks proper to commence an action for the recovery of any claim in favor of the estate, then all mutual claims, of every nature, between the estate and the creditor are to be adjusted and offset in such action. This suit was pending at the decease of the intestate, Joseph Beeman, and it was optional with the administrator to proceed with it, or not, as he thought the interest of the estate required. The defendant presented his account to the commissioners, and at the same time stated to them, that the estate had a claim against him for these services, for which the plaintiff now seeks to recover. No objection appears to have been made by the administrator, against the commissioners allowing the account, nor did he present the claims in favor of the deceased to the commissioners, or signify his election to proceed with this suit. The commissioners proceeded to allow the claims of the defendant, Webster, and we are not to suppose that they did this against the wishes of the administrator. Having found a sum due to Webster, this sum must be treated as a balance of all mutual claims between him and the deceased. There cannot be a balance of mutual claims found due by the commissioners to a creditor, and in a suit at law, a balance adjudged against him. It is obvious to me, by a comparison of the 8th and 16th sections of chapter 49 of the Revised Statutes, that this judgment of the commissioners bars all claims between the parties. The other ground, however, is the one, which governs our decision in this case. The judgment of the county court is reversed, and judgment for the defendant to recover his costs.

IRA A. PRATT, JOSEPH TILLOTSON and HENRY ASSELSTYNE, v. The Town of SWANTON.

A town-meeting warned on the 1st day, and holden on the 12th day, of the same month, is irregular, and its proceedings are not binding on the town.

A subsequent treating of such meeting as valid, either by the town officers or by any portion of the inhabitants of the town, will not be sufficient to ratify the proceedings of the meeting on the part of the town.

Towns cannot be made liable for the expense of building a road, by subsequently repairing the same, and suffering the public to use it as a highway.

ASSUMPSIT on a contract for building a bridge across Charcoal creek in Swanton.

Plea, non assumpsit, and trial by jury.

On the trial in the county court, the plaintiffs offered in evidence, a contract, dated the 22d of January, 1841, signed by Bradford Scott and Henry Asselstyne, second, of the one part, professing to act as a committee of the town of Swanton, and by the plaintiffs, of the other part, whereby the plaintiffs engaged to build said bridge; and the said Scott and Asselstyne, on behalf of said town, promised to pay them a certain sum therefor,—which contract was admitted by the court.

The plaintiffs then offered in evidence, a copy of the record of the proceedings of a meeting of the inhabitants of said town, holden on the 12th day of January, 1841, at which meeting said Scott and Asselstyne were appointed a committee to contract for the building of said bridge—which was objected to, by the defendants, and excluded by the court, on the ground that the plaintiffs did not show any previous warning of said meeting.

The plaintiffs then offered the record of the warning of said meeting, which was objected to by the defendant, and excluded by the court, on the ground that the warning was dated January 1, 1841, and the meeting was warned to be holden on the 12th of the same month.

The plaintiffs then offered to prove, that the meeting of the 12th of January, was fully attended by the inhabitants of said town; that the selectmen and town clerk, and other town officers were present, and that no objections were made to the legality of the meeting; that, after the meeting, the

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said committee obtained from the town clerk, a copy of the record of its proceedings, and showed the same to the plaintiffs, which was one inducement to their making the contract in question; that the town, at a legally warned meeting, holden on the 28th of the same January, affirmed the proceedings of the said meeting of the 12th, in relation to another bridge, then voted to be built across McQuam creek, and for which the town subsequently paid—it having been built under a contract made in behalf of the town, by a committee chosen for that purpose, at the meeting of the 12th; and that, until a short time previous to said trial, said meeting of the 12th, had been considered and treated as legal and valid by said town of Swanton, and the officers thereof. This evidence was objected to by the defendant, and excluded by the court.

The plaintiffs then offered to show, under the general count in the declaration, that they built the bridge in question, in a public highway that had been travelled by the public for more than thirty-five years; that, ever since the building of the same, the people of Swanton, and the public, had used the bridge, which had thereby become the property of the town; and, that said bridge was highly necessary for the travelling public. To this evidence the defendant objected, and it was excluded by the court. A verdict was, thereupon, returned for the defendant. To all which decisions of the court, the plaintiffs excepted.

N. L. Whittemore and *J. Smith*, for plaintiffs.

It is contended by the plaintiffs,

1. That the warning for the meeting, holden on the 12th of January, was sufficient.

2. But, if defective, the town having acted under it, are estopped from taking any advantage of such defect, as against the rights of individuals. *Thayer* v. *Stearns and others*, 18 Mass. Rep. 109.

3. The town, at their meeting, legally warned and holden on the 28th day of January, 1841, recognized the meeting of the 12th, as a legal meeting, by voting "*to rescind all votes taken at the town meeting held at Swanton Falls, on the 12th day of January, inst., in regard to building a bridge across McQuam and Charcoal Creeks, to Hog Island, rais-*

ing money, and appointing a committee to superintend the building of the same."

4. The town have ratified the contract made by the committee, appointed at the meeting holden on the 12th, by paying the plaintiffs for building the bridge across McQuam Creek, which was built by virtue of that contract.

It is contended, that if a contract is made in behalf of a corporation by persons assuming to act as its lawful agents, but without legal authority to make the contract, and the corporation receive the benefit of it, and use the property acquired under it, such acts will be considered as a ratification of the contract, and render the corporation liable to the other party. *The Episcopal Char. Soc.* v. *The Episcopal Church in Dedham*, 18 Mass. Rep., 372.

6. The statute imposes upon the towns, the duty of making and repairing roads and bridges. The bridge in question was, as appears by the case, erected where a public highway had been laid out and travelled for 30 years, and had been used by the public, and the town, from the time it was built to the time of commencing the suit.

The bridge has become the property of the town, so that the plaintiffs can exercise no control over it; and they would be liable if they should destroy it.

The town is bound to keep it in repair, and would be liable for any damage which an individual might sustain, in consequence of its being out of repair.

The evidence offered and excluded by the court, tended to prove a ratification of the contract on the part of the town, and ought to have been submitted to the jury.

G. W. Foster and *A. O. Aldis*, for defendant, contended, that the record of the warning offered by the plaintiffs, showed that it could not have been set up, "at least 12 days before the time appointed for the meeting," as the first day of January should be excluded from the computation.

The day of service and the day on which process is made returnable, are never both counted. The form of expression, designating the time, used in the statute, is that which is most frequently used in our statute, in regard to the service of process; and by long practice, has become settled in

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its construction. Rev. Stat. 171, § 12; 180, § 10; 205, § 11; 324, § 25.

All the proceedings of the meeting, were null and void. The affirming, on the 28th, of the proceedings of the 12th, in relation to another bridge, as stated in the case, shows that the town regarded the meeting of the 12th illegal, and by ratifying only a part of its proceedings, impliedly *refused* to ratify the rest.

The offer to prove that the meeting of the 12th had been "treated and considered," by the town as legal, is indefinite and can amount to nothing. An express ratification by the town, in legal meeting, is not pretended. The town, in such a case, can only be bound by its *acts*. Its silence can impose upon it no obligation.

The plaintiff did not offer to show, under the general count, that the work was done at the request, or by direction of the town, or of its authorized agent; but the claim, under this count, rests wholly in this: "We built a bridge, where a bridge was necessary, and the public have used it"—*therefore* the town of Swanton is liable to pay for it. If this will bind the town, on the ground of an implied contract, then the 76th section of chapter 13 of the statutes, so far as it regards the building and repairing of bridges, is repealed.

The opinion of the court was delivered by

REDFIELD, J.—The questions involved in the decision of the present case do not seem to the court to rest in much uncertainty.

The testimony offered for the purpose of showing, that the town had, in fact, availed themselves of the benefit of the plaintiff's labor, cannot be considered as having any tendency to charge the town with the expense of such labor. It may be true, that if private persons build a road and the public assume the use of it, or, which is the same thing, it is dedicated to public use, and the proper authorities of the town, from time to time, repair it, the town may thereby become liable to continue to keep such road in repair, and even to answer for damages sustained by reason of any "insufficiency or want of repairs" therein. But this does, in no sense, make the town liable for the expense of building

such roads. The towns have no interest, or property, in their roads. They are an onerous burden. In the case supposed, the law does not presume that they employed such persons primarily to build the roads, but that, by repairing the same and suffering them to remain open to public use, they have given the public to understand that they had assumed the burden of *maintaining* them.

This view of the matter seems to be a sufficient answer to every part of the case, except the proceedings of the meeting of the town, January 12th. There is no other action of the town upon the subject, in the mode in which alone they can act in their corporate capacity, i. e. in town meeting legally warned and holden. For it is in vain to say that the conduct of the town officers or of the inhabitants of the town, shall be sufficient to ratify and confirm the informal proceeding of an irregular meeting of the inhabitants, or a portion of them, and thus make them, by implication, binding upon the town, when it is admitted that those persons have no authority to bind the towns in the same matters even by express contract. The meeting of January 12th, was warned on the first day of the same month. This gave but eleven days' notice, unless we reckon both days of the extreme dates, which is contrary to the mode of computing time in this state in analogous cases, as established by long usage, and sanctioned by repeated judicial determinations. In the service of writs and executions, advertising property, &c. in reckoning a given number of days, it has always been practiced to exclude the day of the act. We adopt the same rule here, and this determines the meeting irregular. The votes of such a meeting are no more binding upon the town than if the meeting had been held without notice, or had been a mere fortuitous assembling of any portion of the inhabitants of the town.

Judgment affirmed.

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JOHN GANAWAY *v.* CHARLES MILLER.

Ganaway *v.* Miller.

In an action of account under the statute, the declaration should set forth, distinctly, all the grounds upon which the plaintiff claims to hold defendant to an accounting.

Under a contract for cultivating a farm and dividing the produce and profits the expense of keeping a team and of providing tools and seed may be recovered in an action of account against defendant as bailiff and receiver, under our statute.

A party cannot be compelled to account as bailiff and receiver, under a contract for joint occupancy of land and division of its profits, until the expiration of the time specified in the contract for such occupancy.

THIS was an action of account, brought before a justice of the peace, in which the plaintiff charged the defendant as bailiff and receiver, alleging that, from the 24th of March to the 18th of November, 1841, they were tenants in common of a certain farm, under an agreement by which the plaintiff was to furnish a team, and perform the labor necessary to cultivate said farm, and the parties were to share equally the produce and profits thereof, and pay equal shares of the expenses of the tools, and the keeping of the team, necessary to carry on the same; and that the defendant, during that time, received the whole of the produce and profits of said farm, and did not bear an equal share of the expense of keeping the team and furnishing the tools.

The case was brought, by appeal, to the county court, where a judgment to account was rendered, and an auditor appointed who reported, that he found that the plaintiff moved on to the defendant's farm about the 20th of March, 1841, but did "not find that the precise terms of the taking 'were agreed upon any further than that the plaintiff was to 'furnish a pair of horses to work on the farm without charge 'for use, and that the taking was for a year from the 20th of 'March, 1841." He further found that the plaintiff did the work on said farm, and that "the crops were divided, 'and each of the parties received his share of the produce 'of said farm, and that the plaintiff left the farm on the '18th of November, 1841, without the license of the de-'fendant." And he further found that the plaintiff expended, for keeping the team and providing the necessary tools, above his equal share, the sum of $13.26, and that he expended for seed, over and above his share, the further sum

of $4.46, amounting, in the whole, to $17.72, which he reported to be due from the defendant to the plaintiff.

To this report the defendant excepted, and, on a hearing of the exceptions, the county court rendered a judgment in favor of the defendant; to which judgment the plaintiff excepted.

L. E. Pelton, for plaintiff.

The action of account is the appropriate remedy where one receives more than his portion of the profits of land taken upon shares. *Albee* v. *Fairbanks*, 10 Vt. R. 314.

The lease not having expired at the commencement of the action, forms no valid objection to a recovery, as it was the duty of the auditor to adjust all accounts between the parties up to the time of the audit. Rev. Stat. 220, § 9.

The items of seed-grain, repairs of tools, keeping of the team, &c., may be recovered in this form of action, because they grew out of the contract for taking the farm, and are inseparably connected with its execution. Ganaway has advanced more money than Miller for their joint benefit, and before the balance can be ascertained, their whole dealings, in connexion with the farm, must be adjusted; and this can only be done by the common law action of account, or a bill in equity.

An action of account is the proper remedy where one partner advances more money than his co-partner for their joint benefit.

The auditor did not err in allowing the seed-grain, though not specified in the declaration, as this claim grew out of the letting of the farm, and might be properly allowed in offset to Miller's claim for hay and grain to keep the team, which bore the same relation to the joint tenancy.

Smalley & Adams, for defendant, contended that the plaintiff and defendant were not tenants in common, so as to enable the plaintiff to maintain an action of account, under our statute; but that, admitting that the judgment to account precluded the defendant from insisting, before the auditor, that he was not bailiff and receiver, or tenant in common, yet, as the auditor reported that each party had received his

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share of the produce, there was an end to this action, so far as the rents and profits were concerned.

They also contended that the plaintiff could not, in this action, recover for any breach of contract on the part of the defendant, in not furnishing his proportion of keeping for the team, and his proportion of the seed, because, 1st, the action of account is not adapted to such a case; *Wheeler* v. *Howe*, Miller's R. 208; *Brainard, Adm.* v. *Mayo*, 9 Vt. R. 31; and 2d, because, even if the action of account could be maintained in this case, it could not be brought until after the expiration of the year for which the premises were rented, which was the 20th of March, 1842, while the action was commenced on the 23d of November, 1841.

The opinion of the court was delivered by

Hebard, J.—The first objection to a judgment upon the report is, that the auditor finds that each party has received his share of the produce of the farm, and that the indebtedness found by the auditor is not a proper subject of accounting.

The declaration charges the defendant as standing in such a relation to the plaintiff as, if true, would, under our statute, which is similar in its provisions to the statute of the 4th Anne, hold him to an accounting; and as the expenses of keeping the team, and furnishing tools and seed, would necessarily constitute one of the elements entering into the general result of interest or profits to be divided between the parties, they may well be included in any accounting which shall embrace such interest or profits. But as the declaration, in an action under the first section of our statute "of account," should set forth, distinctly, all the grounds on which the plaintiff claims to hold the defendant to an accounting, and as, in this case, the obligation of the defendant to account for half the seed-grain was not claimed in the declaration, it cannot be recovered in this action. And, besides, it having been found by the auditor that the produce had been shared equally, the presumption would be that the seed-grain had been accounted for in the division.

The expense of keeping the team and furnishing the tools being a proper subject of accounting between these parties, the question arises—shall the defendant be held to account

for a balance existing against him on the 18th of November, 1841? The auditor has found that the plaintiff left the premises on that day without the license of the defendant, and that the contract between the parties was for the occupancy of the premises by the plaintiff for a year, terminating four months after that time, namely on the 20th of March, 1842. It does not follow that, because there was a balance against the defendant at the time of the plaintiff's leaving the farm, there would have been, at the termination of the period provided in the contract for his occupancy of it. No balance can be recovered which does not embrace the transactions between the parties under the contract for the entire year. And, besides, it is not for the plaintiff to claim a fulfilment of the contract when he was the first to disregard it. It is well settled that when one party has partly fulfilled a contract and refuses, without good cause, to complete it, he cannot recover for what he has done.

The judgment of the county court is affirmed.

MASON PETERS *v.* JOSEPH D. FARNSWORTH.

A letter of attorney authorised the agent to sell at the best prices, by public or private sale, as he might think most advantageous, and to execute such contracts, agreements, conveyances and assurances, and perform such acts as might be necessary to perfect the sale;—

Held, that he might execute a deed with covenants of warranty which would bind the principals.

THIS was an action on the case, in which the plaintiff alleged that the defendant fraudulently assumed to have authority to convey to the plaintiff a certain lot of land, with the usual covenants, and did convey to the plaintiff said land, as the attorney of Cadwallader and Astley, and covenanted, for and in behalf of said Cadwallader and Astley, in their names, and as their attorney, that they were well seized of the premises, and that they would warrant and defend the same, &c.

Plea not guilty, and trial by jury.

In support of the declaration the plaintiff gave in evidence a deed of the land in question from the defendant, as attor-

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ney of Cadwallader and Astley, to plaintiff, dated November 11, 1836, containing the usual covenants of seizia and warranty. The plaintiff also gave in evidence the record of a recovery, in an action of ejectment for said land, in favor of D. A. Smalley and wife against the plaintiff, at the September term, 1840, of Franklin county court.

The defendant introduced in evidence a power of attorney, executed by the said Cadwallader and Astley to the defendant, dated May 5, 1806, duly acknowledged and recorded, authorizing the defendant to sell certain lands of said Cadwallader and Astley, including the land in question, " for the best prices that can be gotten or had for the same, ' either by public auction or private contract, as said attorney ' may think most advantageous; and, upon sale thereof, or ' any part thereof, to sign, seal and execute all, or any, such ' contracts, agreements, conveyances and assurances, and ' to do and perform all such acts and things for perfecting ' such sale or sales, as shall be requisite and necessary in ' that behalf."

The defendant contended that, upon a proper construction of said power of attorney, he was authorised and empowered to execute the deed to the plaintiff, and to insert the covenants contained therein. But the court decided, and so charged the jury, that said letter of attorney did not confer upon the defendant authority and power to insert said covenants, and therefore directed a verdict for the plaintiff; to which decision the defendant excepted.

H. R. & J. J. Beardsley, for defendant.

The power of attorney from Cadwallader and Astley confers authority to execute deeds with covenants. It authorises the defendant to sell all or any part of the lands belonging to said Cadwallader and Astley, and upon sale thereof " to sign, seal, and execute all or any such contracts, ' agreements, conveyances and assurances, and to do and ' perform all such acts and things for perfecting such sale or ' sales as shall be requisite and necessary in that behalf."

Now if covenant does not legally import and mean something more or different than " contract, agreement, or assurance," the letter of attorney does, in terms, confer upon the defendant authority to insert the usual covenants.

What then is covenant in a deed, and what is the legal import of the word? Covenant is defined to be the "*agree-'ment* or consent of two or more, by deed, in writing, sealed 'and delivered, whereby either, or one, of the parties doth 'promise to the other, that something is done already, or 'shall be done afterwards." 2 Jacob's Law Dic. 118. It appears, then, that the word covenant imports nothing more than "*an agreement*" to perform or do some particular act or thing. Now the letter of attorney does, in terms, authorise the defendant to execute all necessary agreements.

Again: The letter of attorney authorises the defendant to execute assurances. What then is the legal import of the term "assurance"? It is defined in *Cruise* to be the legal evidence of the transmission of real property, whereby every man's estate is *assured* to him. 4 Cruise's Dig. 9, 18. *Assurance* means something more than a mere sale and conveyance. It is that kind of deed or instrument by which the estate is not only passed, but protected in the hands of the grantee. And this can only be done by inserting the usual covenants or assurances of title, &c., in the deed or instrument of conveyance.

Again: The letter of attorney authorises the defendant to execute such contracts, agreements, conveyances and assurances, and to do and perform all such acts and things for perfecting such sale or sales, as shall be requisite and necessary. Now we insist that this instrument, like every other, is to be construed most strongly against the maker; and if there are any doubts as to the extent of the authority intended to be given, those doubts are to be solved in favor of the authority. Several important words are used in this instrument, that would not be necessary in giving a simple authority to sell. If the rule of construction above laid down, be adopted, and full force is given to all the words used, it must be apparent that more was intended than merely to give such authority. And the phrase "to do and 'perform all such acts and things as shall be requisite and 'necessary to perfect such sale," must be construed to intend the giving such a deed and conveyance by the defendant as would perfect and protect the title in the grantee.

In construing a power of attorney, the letter of the instrument is not to be exclusively regarded, but the important

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inquiry is, have the intentions of the parties been carried into effect? *Wilson* v. *Troup*, 2 Cow. R. 195, 232, 234.

Again: It is well settled that, in the construction of powers of attorney and all other contracts, the situation of the parties, the subject matter of the transactions between them, the usual manner of transacting the business named in the instrument, the place where the business is to be transacted, are all to be taken into the account in determining the meaning of the instrument or any sentence therein. 2 Cow. 228.

To apply these rules to the present case, it appears that the power of attorney was executed to the defendant, who resides in Fairfield, in Vermont, and that the subject matter related to lands located in Franklin county, Vermont; and it should so be construed as to give authority to do whatever is usually required to be done in conveyances of real estate in Vermont. Now what are the usual modes or instruments of conveyances in this state? They are what are called quit-claim deeds and deeds with the common covenants of seizin and warranty, &c. That one of these modes of conveyance was contemplated by the parties to the instrument, there can be no doubt. A quit-claim cannot be regarded in any sense as an assurance. The most common instrument of conveyance is a deed of warranty.

The makers of this instrument resided in Pennsylvania, out of this jurisdiction. It is not to be supposed that purchasers of their estate would take a mere acquittance. It must be considered, then, that they intended to authorise the defendant to execute such a deed as a purchaser would take, or might require.

Smalley & Adams, for plaintiff.

The defendant was a special agent, constituted for a particular purpose, and had merely authority to take charge of the lands of his principals, specified in their power of attorney to him, to sell them, and, on receipt of payment, to give sufficient conveyances and discharges, to perfect such sale. His undertaking, therefore, to bind his principals, by covenants of warranty, was exceeding his authority, and void, as to them, but he is personally liable to the plaintiff. *Rossiter* v. *Rossiter*, 8 Wend. R. 494.

1. An authority to sell, and make conveyances and assurances of real estate, does not imply or confer authority to execute deeds with covenants of warranty of title, so as to bind the principal. *Nixon* v. *Hyserott*, 5 Johns. 57; *Gibson* v. *Colt*, 7 Johns. 390; *Fenn* v. *Harrison*, 3 Term R. 757, 412.

2. The defendant, having assumed to have authority to make the covenants in question, when he had not, is personally liable to the plaintiff, for the damages he has sustained by his not obtaining the covenants for which he paid. *Sumner et al* v. *Williams*, 8 Mass. R. 162, 189, 209, 212, 213; *Mott* v. *Hicks*, 1 Cow. 513; *Stone* v. *Wood*, 7 Cow. 453.

3. The defendant is liable in this form of action, though no other act of fraud be shown than the false assumption of authority. Assuming a false character, and thereby deceiving others, is, in the eye of the law, a fraud, whether it arise from ignorance in the pretender, of his true character, or from an intention to deceive and defraud. In a civil suit, the pretender is not prosecuted to punish him for his wicked intentions, but to obtain compensation for the injuries which his assumption of a false character has brought upon others. Gould's Plead. 189; 2 Kent's Com. 2d edition, 631; *Clark* v. *Foster*, 8 Vt. R. 98; *Long* v. *Colburn*, 11 Mass. R. 97; *Ballou* v. *Talbot*, 16 Mass. R., 461.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—Exceptions were taken to the decision of the county court, by both plaintiff and defendant. The exception taken by the plaintiff is, to the rule of damages laid down by the court. Those taken by the defendant involve the inquiry, whether the plaintiff can maintain any action against the defendant, on the facts appearing in the case; and this depends on the construction to be given to the letter of attorney from Cadwallader and Astley to the defendant, for if that letter of attorney authorized him to execute the conveyance to the plaintiff, with the covenant of warranty, the suit of the plaintiff fails.

In certain sales of personal property, the agent who is empowered to sell, is authorized to give a warranty of the soundness of the article sold, on the ground, as was said by Lord Ellenborough, *Alexander* v. *Gibson*, 2 Camp. 555, that, as it is now usual, on the sale of horses, to require a

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warranty, the agent may be fairly presumed to be acting within the scope of his authority. Were we without the authority of any adjudged case on the subject, I should strongly incline to the opinion, that, inasmuch as it is usual, and customary, to insert covenants in most deeds of conveyance, more or less restricted, as the interest of the grantor may require, a letter of attorney, authorizing any one to sell, and to execute deeds or assurances, would authorize the inserting in the deed or assurance, any such reasonable covenants as are usual in such deeds, limited only, by the discretion of the attorney. And it appears to me, that such a principle was recognized in the case of *Wilson* v. *French*, 2 Cowen, 195, where it was holden, that, under a power to mortgage, the agent was authorized to insert a power to sell, on default of payment. It is true, it was holden, in the case of *Coles* v. *Kender*, Cro. Jac. 571, that on a promise to make reasonable assurance of land, the defendant was not bound to execute a conveyance, with ordinary and reasonable covenants; but in the case of *Lapels* v. *Chatterton*, reported in 1 Mod. 67, and in Raymond, 190, it was said by Twisder that the law is altered, since the *Coles & Kender* case, as to covenants in a conveyance, if they be reasonable. It appears to me, it would but be extending the principle of the latter case to the present, to say, that, under a promise, or under a power of attorney to sell and deed, a deed with a covenant to secure the title, such as is usual, should be required. The court of appeals in Kentucky have decided that a power to sell lands includes an authority to convey with covenants of general warranty. *Vanada* v. *Hopkins*, 22 Marshall's R. 293. The case of *Nixon* v. *Hyserott*, 5 Johns. 58, is, however, opposed to this view; and the authority of the latter case is recognised both in the 7 & 12 Johns. and 2 Cowen. Upon this subject it is very desirable that the law should be considered the same in the different states. In the case of *Nixon* v. *Hyserott* it is to be observed, that the letter of attorney authorized the attorney "to grant, bargain, sell, release, convey and confirm in fee" to any person, certain specified lots, and that these are the operative words made use of in the granting part of a deed, and had no reference to the species of conveyance which the attorney might adopt. The further words "to exe-

cute," &c. "such conveyances, assurances," &c. neither enlarged, extended nor limited the authority first given, but only left it to the attorney, to adopt such conveyance, as, in his judgment, might be needful to transfer the title. The letter of attorney gave no other authority, except to sell, and execute such deeds as the attorney might think necessary to effectuate the sale. It was so treated in the case of *Gibson* v. *Colt and others*, 7 Johns. 390, and *Van Eps* v. *Schenectady*, 12 Johns. 436, where the case was mentioned.

In the case before us, the letter of attorney to the defendant authorized him to do all that was necessary in relation to certain tracts of land in Bakersfield and Fairfax to obtain possession, and to "sell for the best prices, either by public 'auction or *private contract*, as he might think *most advan-* 'tageous. And, upon sale thereof, or any part thereof, and 'on receipt of the money, arising from such sale or sales, to 'give sufficient releases, acquittances and discharges for the 'same, and to sign, seal, [illegible] all or any such *con-* 'tracts, *agreements*, [illegible] *assurances*, and to 'do and perform all such acts and things for perfecting such 'sale or sales thereof, [illegible], as shall be re- 'quisite and necessary in that behalf." Under this letter of attorney he was bound to make such contracts, as would be most advantageous to his principals, and to obtain the best prices, and was authorized to make such contracts or agreements—which, if under seal, would be covenants—as were requisite; and could bind his principals thereby. He could bind them to make a good title by warranty deed, or otherwise. The authority was plenary to bind the principals by a contract, covenant or agreement, to secure the title to the purchaser, and he could execute a deed, conveyance, or assurance, with such covenants as were necessary to procure the best prices and the most advantageous terms of sale. We think, therefore, that, under this letter of attorney, he was fully authorized to execute the deed to the plaintiff with the covenants therein contained, and by such covenants Cadwallader and Astley were obligated to assure the title, and the defendant did not exceed his authority and was not liable in this action.

The judgment of the county court is reversed.

GRAND ISLE COUNTY.

JANUARY TERM, 1843.

PRESENT HON. CHARLES K. WILLIAMS, *Chief Justice.*
" ISAAC F. REDFIELD, } *Assistant Justices.*
" MILO L. BENNETT, }

DE CLANCY STOUGHTON, JR., *v.* DANFORD MOTT.

Under the act of Congress of 1838, commonly called the neutrality act, the collectors and other officers therein mentioned, were authorized to seize and detain vessels having arms, &c. on board, passing towards a foreign state or colony, conterminous with the United States, when they had reason to believe that the vessels, &c. were to be employed in a military expedition or operation against such state or colony.

The term "*frontier*," means something more than the boundary line. It means a tract of country contiguous to the line; and it is not material whether such vessels, &c. were actually intended to be passed across the boundary line into the foreign territory.

When a plaintiff, in his replication, traverses an immaterial fact, which is found in his favor, the defendant cannot have judgment, *veridicto non obstante.*

THIS was an action of trespass, in two counts, for seizing and conveying away, at Champlain, in the state of New York, on the 10th of November, 1838, a sloop, called the Gen. McComb, and also for seizing, taking, and carrying away, on the 12th of said November, certain arms and munitions of war, found on board of the same.

The defendant pleaded the general issue; and also three pleas in bar of the action.

The first plea in bar, was, in substance—that, at the time of the alleged seizure, the defendant was a deputy collector of the customs, for the district of Vermont; that, on the 8th of said November, said sloop arrived at Rouse's Point, in said Champlain, near the northern boundary of the United States, from some place south of the same, having on board, large quantities of arms and munitions of war, and was about to pass the frontier of the United States, for some place within

the province of Lower Canada; that, from the character of the vessel, and the quantity of arms and munitions of war, there was probable cause to believe, and the defendant did believe, that said sloop and arms, and munitions of war, were intended to be employed by the owner or owners thereof, in carrying on a military expedition against the province of Low-Canada, a province of the kingdom of Great Britain, with whom the United States were at peace; and that, for the reasons aforesaid, the defendant seized said sloop, and said arms and munitions, and detained the same for the decision of the President of the United States, as by the laws of the United States he was commanded to do; which is the same taking complained of.

Second plea in bar, the same as the first, except that Thomas Crook is stated to have been a deputy collector in the northern district of New York, and that the taking was by his order.

Third plea in bar, the same, except that it is stated that Justin Dimmick was a captain in the United States army, commanding certain troops of the United States, at said Rouse's Point, and that the taking was by his order.

Replication to the pleas in bar, that the sloop was not, at the time of said seizure, about to pass the frontier of the United States, as in said pleas alleged. Issue to the country.

On the trial in the county county court it appeared by the evidence on the part of the plaintiff, that the said arms and munitions of war were collected at a place called Alburgh Springs, and put on board the said sloop on the night of the 6th November, 1838; that on the seventh of the same November, the said sloop, with the said arms and munitions of war on board, was sailed from Alburgh Springs to said Rouse's Point, the said Point being about one mile south of the said boundary and the most northern landing place in the United States;—that on the said 7th of November, a battle was fought between a portion of the British troops, and a party commonly called the patriots, in the province of Canada adjoining, and near to said Rouse's Point, and that, while the said battle was raging and about the time of its conclusion, by the defeat and flight of the patriots, the said sloop rounded to, at said Rouse's Point and cast anchor in the stream about fifty rods from the wharf at said landing place. The

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plaintiff's evidence tended also to show that the said sloop was chartered to go from said Alburgh Springs to said Rouse's Point and *no further* to the north; but the same evidence also tended to show that the said arms and munitions of war were intended to be used in the said patriot service in the said province of Canada, and to be transhipped from said sloop to small boats, and by them conveyed to some place within the said province.

It appeared by evidence on the part of the defendant, that he was a deputy collector and inspector, under the collector of the customs for Vermont district; that one Thomas Crook was, in like manner, a deputy collector and inspector, under the collector of the customs for the northern district of New York, and that Justin Dimmick, captain of artillery in the United States army, was then stationed, and had command of the United States troops then stationed, at said Rouse's Point.

Evidence on the part of the defendant was, also, introduced, tending to show, that, after the said sloop had rounded to at Rouse's Point and cast anchor, the said Capt. Dimmick requested the defendant and said Crook to go on board the said sloop and make due examination as to the loading, and that for that purpose, the defendant took his boat, and hands, and conducted the said Crook, with a sergeant's guard, on board the said sloop, and that, after making the examination, and ascertaining that the said sloop was loaded with fixed ammunition, powder, balls, &c., and finding no one on board, Crook left the guard on board and returned with the defendant to the shore, and made report of the loading to Capt. Dimmick; and that, thereupon, Dimmick requested the defendant and Crook to seize the said sloop and bring her to the shore; that the defendant declined making the seizure, as it was in Crook's district, and was, therefore, more appropriately his duty; and that, thereupon, Dimmick requested Crook to make the seizure, and that Crook did seize said sloop and convey it to the shore, when Dimmick took control of the arms and munitions, and caused them to be taken out of the sloop and secured, in obedience to the act of Congress of the 10th March, 1838.

Evidence was introduced on the part of the plaintiff, tending to prove that the defendant was, voluntarily, aiding and

assisting, both in the first examination of the sloop, and in the actual seizure and detention of the same, and tending to prove his subsequent repeated admission that he seized the sloop. It appeared that, in consequence of her being improperly moored at the wharf, the sloop broke loose, in a high wind, during the first night after the seizure, and went ashore, where she had remained a wreck, up to the time of the trial. It also appeared that the sloop was brought to the wharf within two or three hours after she was boarded and the guard left on board as aforesaid. It did not appear that the defendant or Crook was on board when the vessel was brought to the wharf; but she appeared to have been brought there under the immediate direction of one Philips who went on board after the defendant and Crook had returned to the shore as aforesaid.

On the subject of the taking, the defendant's counsel insisted that the act of boarding the sloop, for the purpose of ascertaining the character of the loading, was not a taking of the vessel, for which the action of trespass would lie. And to this the court assented, and instructed the jury accordingly. The defendant's counsel further insisted that if the manner of boarding in this instance, as by posting and leaving a military guard on board, did amount to a taking of the vessel, yet, for that taking, the defendant was not responsible, unless he united or participated in the order of Crook or Dimmick for such taking of possession. On this point the court charged substantially as follows: That if the defendant, knowing it was intended to take possession of the sloop, if she was found to have munitions of war on board, voluntarily assisted with his boat and hands to carry that purpose into effect, he was, in legal contemplation, a party and principal in the trespass. To which direction the defendant excepted.

Under the issue upon the pleas in bar, the defendant insisted that the arms and munitions of war were liable to seizure and detention by the law of Congress of the 10th of March, 1838, commonly called the neutrality law, independent of the question, whether the sloop was about to pass the frontier, or not; and that, in relation to the sloop, the term *frontier*, in the said act of Congress, was not limited to, and did not mean, an imaginary line, without breadth, dividing the

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United States from said province of Canada, but was intended to embrace a belt of country contiguous to, and bounded on the north by said line. But the court decided, and so charged the jury, that the term *frontier*, in the said act, was the dividing line between the two countries, and that the defendant had not authority, under the said act, to seize and detain the said sloop, without evidence, satisfying the jury, that the said sloop was to be conveyed beyond the said line, and into the said province of Canada; that the circumstances of the loading on board, the use to be made of it, and the apparent direction of the sloop, were matters to be weighed in connexion with the evidence relating to the alleged contract of the parties limiting the voyage; and that, unless the jury were satisfied that, in point of fact, it was the intention of the parties that the sloop should pass the line, it did not amount to a passing the frontier of the United States, as contemplated in the said act, and did not, on the defendant's part, sustain the issue on trial under the special pleas.

The court further instructed the jury that, inasmuch as the defendant had not, in pleading, claimed a temporary right of detaining the vessel, as incident to that of seizing and taking away the munitions of war found on board, no such temporary right was properly in issue, or to be regarded by them.

Verdict and judgment for the plaintiff. To the decision and charge of the court under the issue upon the pleas in bar, the defendant excepted.

C. Adams, for defendant.

I. The court erred, in charging that the term frontier meant the dividing line between the two countries. It does not mean a line without breadth, dividing countries, but a belt of country bounded by that line. In Webster's dictionary, it is defined to be *the border*, *confine*, *extreme part* of a country. It is a word of frequent occurrence in the laws of the United States, and is never used as the dividing line, but is always used as designating the country bordering on the line. 4 U. S. Laws 2255, 2272, 2348, 2460.

II. The court also erred, in directing the jury that the decision of the question of passing the frontier, rested on the proof of the intention of the party. The court decided

"that, unless the jury were satisfied that, in point of fact, it 'was the intention of the parties that the sloop should pass 'the line, it did not amount to a passing of the frontier of 'the United States, as contemplated in the said act." Under that charge, if the sloop had been taken across the line, it would not have justified the defendant, without proof, that it was taken in conformity to such intention. So when abandoned by the parties, if, instead of being anchored it had drifted over, or if the patriots had come over and taken it, it would not have come within the charge.

The intention of the party, was not a traversable fact. It is not one of the conditions on which the right of seizure rests. The character of the articles seized, and of the officer seizing, being admitted, there were but two issues that could be raised, namely, that the articles were in motion on the frontier, and probable cause of belief. The act must have this latitude of construction, or Congress have signally failed to carry out their own intention. Congress intended to prohibit the transportation of all arms and munitions into Canada, and the officers of government were required to detain, where circumstances indicated such intention.

F. Hazen and *O. Stevens*, for plaintiff.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This was an action of trespass against the defendant, for seizing, taking, and conveying away, a certain sloop called the Gen. McComb, and, also, certain arms and munitions of war. To the declaration the defendant plead the general issue, and a plea in bar, and the plea in bar is traversed. On the trial by the jury, a verdict passed for the plaintiff, and the defendant moved for a judgment, *veridicto non obstante*, which was overruled by the court. The defendant endeavored to justfy the seizing and detaining the vessel, &c., under an act of Congress, passed in 1838, commonly called the neutrality act, which provided for the seizing of vessels and arms, prepared for expeditions against conterminous territory of foreign nations, with whom the United States were at peace.

On the subject of the taking, the defendant's counsel requested the court to instruct the jury, that the act

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of boarding the sloop, for the purpose of ascertaining the character of the loading, was not a taking of the vessel, for which the action of trespass would lie. To this the court assented, and charged the jury accordingly. They further requested the court to charge, that if the manner of boarding, &c., did amount to a taking of the vessel, yet the defendant was not responsible, unless he united or participated in the order of Crook or Dimmick, for such taking. The charge of the court was, in substance, that if the defendant knew of the intention of taking the vessel, and voluntarily assisted with his boat, he was, in contemplation of law, a party and principal in the trespass. The charge was undoubtedly correct, in this particular, as it was evidently such an invasion of the property of the plaintiff, as would amount to a trespass, and for which, unless justified, the defendant was liable. Indeed, it may be questioned whether the court did not go too far, in acceding to the first request of the defendant, if there had been no other plea but the general issue.

The plea in bar sets forth, in substance, that the defendant was a deputy collector; that the sloop, Gen. McComb, arrived at Rouse's Point, near the northern boundary of the United States, from some place to the south, and was then and there about to pass the frontier, for some place within the province of Lower Canada, having on board arms and munitions of war; and that, from the character of the vessel, and the arms and munitions of war on board, there was probable cause to believe, and the defendant did believe, they were intended to be employed in military operations in the province of Canada, &c., and for the reasons aforesaid, the defendant, as such deputy collector, did seize and detain the said sloop, and the said arms, &c. In the replication, the plaintiff denies that the sloop was about to pass the frontier of the United States, and issue is taken upon that fact only.

On the trial, the question arose as to what should be considered the frontier. The court decided that the frontier was the boundary line, between the United States and the province of Canada; and unless the evidence satisfied the jury that the sloop was to be conveyed beyond the line, and into the province of Canada, the defendant had no authority, under the act before mentioned, to seize and detain the ves-

sel. We think the court were incorrect in both of these decisions, as to the construction of the act of Congress, before mentioned. The term frontier, embraces a tract of country of a greater or less width, bordering on, and contiguous to, the line; and, though both the act of Congress, and the plea, speak of the vessel, as about to pass the frontier for a place within a foreign state or colony, yet, we do not consider it necessary, in order to justify the officers therein mentioned, in seizing and detaining a vessel, &c., that the vessel should actually be about to pass the boundary line. Indeed, such a construction would render the act wholly insufficient and inoperative. It cannot be that a vessel, with arms and munitions, might approach the extreme verge of the frontier, close to the line, where, as the evidence tends to prove, all the arms, ammunition and munitions of war, could be taken therefrom, and used with the consent of the owner, in forwarding, and carrying on, military operations within the territory of a foreign power, with whom the United States were at peace, and no officer of the United States be justified in interfering. We think the officers mentioned in the act of Congress, were authorized and justified by that act, in seizing and detaining any vessel, having on board arms or munitions of war, sailing in the frontier, and near to the boundary line, and in a direction to the foreign province, if they had *probable cause to believe, and did believe*, either from the character of the vessel, or the quantity of arms and munitions, on board, or other circumstances, that either the vessel or the munitions of war, were intended to be employed, either by the owner thereof, or any other person with his privity, in carrying on any military expedition or operations, within the territory of a foreign power. As the decision of the court made the justification of the defendant to depend wholly on the fact, whether the vessel was about to pass the boundary line of the United States, into the province of Canada, the decision was erroneous and must be reversed.

It follows from the opinion already expressed, that the plaintiff, in his replication, traversed an immaterial allegation in the defendant's plea; leaving the material part unanswered. The defendant now insists, that he is entitled to a judgment, notwithstanding the verdict. Such a judgment is never rendered for a defendant. It is only rendered for a plaintiff,

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upon the confession in a plea, bad in substance. When a defendant passes over a replication, insufficient and immaterial in law, without demurrer, and an issue of fact has been joined on such immaterial replication, and found against him, the court, not knowing from the finding of the jury, for whom to give judgment, will either award a repleader, or arrest the judgment, on a proper motion therefor, as a useless trial might have been prevented if the plaintiff, instead of joining issue, had demurred to the traverse. No motion, either in arrest or for a repleader, has been made. But as the judgment of the county court is reversed, and the cause will have to be remanded there for trial of the general issue, the counsel can there make such application to alter or amend the pleadings as they may think the interest of their clients require.

The judgment of the county court is reversed.

DANIEL M. BROWN *v.* HORACE WADSWORTH and WILLIAM W. WHITE.

The judgements of courts martial are conclusive, like those of any other courts, unless some defect in regard to their jurisdiction is shown.

TRESPASS for a cow. The defendants pleaded, severally, each, the general issue. They also pleaded, severally, two pleas in bar.

The defendant, Wadsworth, in his pleas in bar, alleged in substance, that the plaintiff, having been enrolled in the 1st company, 10th regiment, 1st brigade, and 2d division of the militia of this state, was, in May 1839, duly warned to appear in said company, armed and equipped, on the 4th day of June then next, and that he did not appear in obedience to said warning; that, on the 9th of July following, the commander of said company issued a notification to the plaintiff that he was amerced in a fine for said non-attendance, and commanded one Henry White, a sergeant of said company, to serve the same on the plaintiff, and to summon him to appear before a court martial of said regiment to be holden on the 25th of said July, to show cause why judgment should not be rendered against him, and execution

issued thereon, which was served on the plaintiff on the 12th of the same month, *by reading said notification in his hearing*; that said court martial was holden on said 25th of July, when the said captain reported the plaintiff as delinquent, as aforesaid, and said court thereupon amerced him in a fine; that the defendant, Wadsworth, was senior field officer of said regiment, and, as such, issued execution against the plaintiff for said fine and the cost, and delivered the same to the defendant, White, then quartermaster of said regiment, who levied the same on the plaintiff's cow, which was the alleged trespass complained of.

The pleas in bar of the defendant, White, contained the same allegations as those set forth in the pleas of Wadsworth, and justified the taking, under the process from Wadsworth, as in his pleas set forth.

To these pleas in bar the plaintiff replied that he was not furnished, or served with, a copy of any charges or specifications upon which he was tried before said court-martial, ten days before said trial, or at any other time.

To this the defendants severally rejoined, alleging that the plaintiff appeared by his attorney before said court martial, and had his day in court, and might and should have availed himself of the matter set up in his said reply, &c.

There was thereupon a demurrer, and joinder in demurrer.

The county court, *pro forma*, rendered judgment for the defendants. The plaintiff excepted.

H. Adams, for the plaintiff.

The plaintiff contends that a regimental court martial, constituted by the act, regulating and governing the militia of this state, approved November 1, 1837, is a court of special and limited jurisdiction, deriving all its authority from statute. If such court, therefore, exceed the authority given it by law, its acts and proceedings are *absolutely null and void*, and *all concerned therein are trespassers*. *Hendrick and wife* v. *Cleaveland*, 2 Vt. R. 329. The same doctrine is also recognized in *Walbridge* v. *Hall*, 3 Vt. R. 114, and *Wise* v. *Withers*, 1 Cond. Rep. 552. The 24th article chap. 9, in sec. 1, of said act—Rev. Stat. 573—declares that every non-commissioned officer, musician or private, to be

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tried by a court martial, shall be furnished with a copy of the charges and specifications, upon which he is to be tried, at least ten days before his trial is commenced and the pleadings here plainly show that this was not done. See N. Y. Dig. p. 524, Martial Law, Courts Martial; and p. 524, Nos. 14 and 15, Militia Law.

W. W. White, for defendants.

1. The 4th sect. of chap. 11th of the act "regulating and governing the militia," passed in 1837, in which is pointed out the mode of proceeding in the collection of fines for non-appearance and for not being furnished with arms and equipments (see 19th & 20th art. chap. 9, act of 1837) at any company training, does not require that the individual amerced should be furnished with a copy of charges or specifications ten days before the regimental court martial shall assemble, but, on the contrary, that the "*notification 'shall be served by being read in the hearing of such de-'linquent or by leaving a true and attested copy thereof at 'his last and usual place of abode*," and no other notice whatever is required. Rev. Stat. 579–80, 4th sect. The 24th art. (chap. 9th) has reference, particularly, to brigade courts martial.

The irregularity of the service of the notification, or an omission on the part of the officer to furnish a copy of charges or specification ten days before the sitting of the regimental court martial, if such was required, does not render their judgment or proceedings void. The principle is well settled in this state, that a judgment of a court of competent jurisdiction is *conclusive* until reversed, annulled, or, in some manner set aside, and that it cannot be attacked, collaterally, by evidence tending to show that it was irregularly or improperly obtained. A judgment cannot be collaterally impeached. *Moore* v. *Allen & Bateman*, 1 D. Chip. R. 382; *Hoxie* v. *Wright*, 2 Vt. R. 268; *Smith* v. *Rice*, 11 Mass.; *Walbridge* v. *Hall*, 3 Vt. R. 114; *Evarts* v. *Gove*, 10 Vt. R. 161; 2 Aik. R. 251; 7 Term R. 265; 2 Dallas' R. 302; 2 Wilson, 385; Arch. C. Plead. 219; 1 Stark Ev. 212, 222; 13 Johns. R. 521, 8 do. 157.

The proceedings in this case are not even voidable, inasmuch as there was an appearance, and a neglect, upon the

part of Brown to plead such matter in abatement, or to avail himself of the same in his defence. It must, therefore, be considered as *waived* and cannot be assigned for error. *Kellogg, ex-parte*, 6 Vt. 519.

2. The execution, under which White justifies, being good upon its face, is a sufficient justification to him, and he was not bound to look beyond his precept to see whether there was any irregularity in the previous proceedings, before executing it. *Darling* v. *Brown*, 10 Vt. R. 148; *Gage* v. *Barns*, 11 Vt. R. 195; *Hill* v. *Wait*, 5 Vt. R. 127. Trespass will not lie against the commandant who acted in a a judicial capacity, and not ministerially.

The opinion of the court was delivered by

REDFIELD, J.—The only question to be determined in this case is, whether the proceedings of the court martial can be avoided, for the insufficiency of the notice to the plaintiff. In regard to these summary and special jurisdictions, it has long been settled, that any matter, which goes to show a want of jurisdiction, either of the subject-matter adjudicated, or of the person of the alleged delinquent, may be shown, to avoid the effect of their judgments.

But where they have, as in the present case, jurisdiction, both of the subject-matter, and of the person of the party, the effect of their adjudication cannot be avoided, by any circumstantial irregularity in the detail of the proceedings, either before, or at the time of trial. As Lord Ellenborough said, in the case of *Tarleton* v. *Tarleton*, 4 M. & S. 21, in regard to a foreign judgment, "The trial in this action is not in the nature of a writ of error upon the proceedings" in the court martial. Their jurisdiction being fully shown, the plaintiff is bound by the amercement. *Darling* v. *Brown*, 10 Vt. 148. Case in Washinton county, July term, 1839, not yet reported.

Judgment affirmed.

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MATHEW BURNS *v.* WILLIAM BROWN and ABEL BROWN.

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Where a feme sole is seized, in fee, of several parcels of land, and marries, and then joins with her husband in a mortgage of a part of them, to secure his debt, if the husband and wife afterwards sell the whole, subject to the mortgage, which the grantees assume to pay, and the balance of the purchase money be secured to a trustee for the separate use of the wife—such balance not exceeding her reversionary interest in the lands—the grantees will not be subjected to a *quitam* prosecution, for a penalty under the statute to prevent fraudulent conveyances, though it was the intention of the parties to the conveyance, to secure to the wife such balance from the proceeds of the sale.

THIS was a *quitam* action, to recover a penalty, for the fraudulent conveyance of real estate, in which the plaintiff declared, that, on the 12th day of March, 1841, one Jonathan Goodwin being indebted to the plaintiff, in the sum of $475.05, and being seized, in right of his wife, Caroline Goodwin, of three parcels of land, of the value of $2.500, did, in conjunction with his wife, and with intent to defraud the plaintiff of his said debt, convey said parcels of land to the defendants, who accepted said conveyance with the knowledge of such intent, and with the purpose of aiding in its execution.

Plea, not guilty, and issue to the country.

On trial, in the county court, evidence was given tending to prove that the wife of Goodwin was the owner, in fee, of two of the parcels of land, described in the plaintiff's declaration, and that she had an estate in the other of said parcels during the life of her mother; that, in 1837, Goodwin and his wife executed to the plaintiff, a mortgage of one of said parcels of land, containing about sixty-four acres, to secure the payment to him, of a debt, which, at the time of the conveyance to the defendants, amounted to about $1,300; that at the time of said conveyance to the defendants, Goodwin was indebted to the plaintiff, in the sum stated in his declaration, which was not secured by the said mortgage; that the whole interest of Goodwin and wife in the several parcels of land conveyed to the defendants, was worth, at the time of said conveyance, about $2.000, which was the sum which the defendants agreed to pay therefor; that, in payment thereof, the defendants assumed to pay the said $1300, the amount of the incumbrance on one of said parcels, and for

the remaining $700, gave their note to one Lewis Mott, payable in seven years with interest, in trust, for the benefit of the said Caroline and her children, who were admitted to be the children of the said Goodwin; that, at the same time, the defendants executed a writing, promising that, if the excess above the mortgage should be found to be more than $700, they would pay the difference; that at the time of said conveyance to the defendants, and the execution by them of the note of $700, they designed to secure to the separate use of the wife and children of Goodwin the excess of the purchase money above the mortgage debt, due the plaintiff, and to prevent the plaintiff from collecting his debts by means of the property, further than they were secured by the mortgage; and that the note was given in trust, for this purpose, and with this intent.

The court, among other things, charged the jury, that chancery would protect the wife of Goodwin in her share of the consideration which was paid for the lands conveyed by her and her husband, to the defendants—which would be equal to her reversionary interest in the same, after the determination of her husband's interest; that the creditors of Goodwin never had any right in, or control over, this reversionary interest; and that, if they should find, from the evidence, that the said mortgage incumbrance, which was to be paid by the defendants as a part of the consideration of their purchase, was equal to, or greater than, the whole interest which the husband had acquired in the lands in question, by his marriage with his wife, then it would be their duty to return a verdict for the defendants.

The jury returned a verdict for the defendants, and the plaintiff excepted.

Smalley & Adams, for plaintiff.

I. The court charged the jury, that chancery would protect the wife of Goodwin, in her share of the consideration which was paid for the land—a proposition, the truth of which, it is not deemed necessary to discuss. It was, however, calculated to mislead the jury, inasmuch as it seems to entirely misapprehend the gravaman of the action. The suit was not brought on the assumption that the defendants, by taking a conveyance of the reversionary interest of Good-

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win's wife, had defrauded the plaintiff; but for their having, with intent to defeat and avoid the plaintiff's right and debt, become parties to a deed from Goodwin, of his life estate to the lands in question.

II. The court further charged the jury, that if they found the incumbrance placed on the 64 acre tract of land, by the husband and wife equal to, or greater than, the whole estate which Goodwin had acquired by marriage, in the several tracts conveyed to defendants, then they should return a verdict for the defendants. This branch of the charge is erroneous in several particulars.

1. If, by it, we are to understand—which seems to be its plain import—that the jury were instructed, that if the value of Goodwin's interest in the several tracts of land conveyed to the defendants, did not exceed the incumbrance on the 64 acre piece, then he had no interest whatever in the lands, it is clearly wrong. For had the mortgagee foreclosed his mortgage, and taken possession of the 64 acre tract, it cannot be pretended, that this would have extinguished Goodwin's right or interest in the other tracts. After the foreclosure of the mortgage, or before, any creditor of Goodwin would have a right to attach and levy upon his life estate in the sixteen acre piece, and the twenty acre piece, unless some mysterious influence and power were conferred on this particular mortgage.

2. If, from the whole charge, we are to understand that the jury were instructed that, if Goodwin had, prior to the alleged fraudulent conveyance, expended and squandered property of his wife that he had acquired by his intermarriage with her, and by her consent, equal in value to the whole interest which he had left in the remainder of the estate of the wife, then he had no interest in that estate to which his creditors had any right, the charge is erroneous, whether tried by the rules of law or equity. For, 1. The husband, after issue—which is the fact in this case—acquires a life estate in the real estate of his wife, as tenant by the curtesy initiate. His creditors have a right to attach and take his estate thus acquired; and no authority can be found that will sustain the doctrine that, at law, the husband can make a voluntary settlement of his property to the use of his wife, in order to defeat his creditors, though he may

have used, and wasted, ever so much of his wife's estate, and the very property which he settles to her use may be the property which he acquired in her right. 2. In equity it seems to be a well settled principle that the legal estate of the husband in the wife's property, when reduced to possession, cannot be protected from the creditors of the husband. Preston on Legacies, 226.

In the state of New-York, where the court of chancery has been liberal in lending its aid to protect the wife's property, this conveyance to the defendants would be decreed void. *Van Duzer* v. *Van Duzer*, 6 Paige, 366; *Wikes* v. *Clark*, 8 Paige, 161; 19 Conn. R. 137.

Stevens & Seymour for defendants.

In this case, the defendants insist that the charge of the court was correct in instructing the jury, that, if they found that the plaintiff had received of Goodwin, by means of the mortgage excuted by Goodwin and wife, the full amount of Goodwin's interest in the lands deeded, the defendants could not be liable in this action.

In the first place, we contend that the wife, by uniting with her husband in securing, by mortgage, the debt due the plaintiff, was entitled to have his interest in her real estate, as tenant by the curtesy, first applied to the payment of the debts in exoneration of her estate. *Neimcuzwitz* v. *Gahn et al.*, 3 Paige, 614.

A court of equity would, upon the application of these defendants, have protected the wife's interest to as great a degree, if not further, than has now been done. *Dun* v. *Bowyer*, McCord's Ch. R. 368, 372; Am. Ch. Dig. vol. 1, 526.

If, then, the defendants have only done that which a court of equity would have ordered them to do, can they be liable in a penal action?

The opinion of the court was delivered by

BENNETT, J.—The court can discover no reasons for disturbing the verdict of the jury. They were told, that if they found, that the mortgage incumbrance which had been placed by Goodwin and his wife upon a portion of her lands, for the benefit of Goodwin, and to secure his debt,

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and which was to be paid out of the consideration paid for these lands, was equal to, or greater than, the whole interest which the husband had acquired therein, by the means of his intermarriage with his wife, then it would be their duty to return a verdict for the defendants. The charge proceeds upon the ground that the wife, upon the sale of her lands, is equitably entitled to such a portion of the consideration, as would equal her reversionary interest. In the case of *Neimcuzwitz* v. *Gahn et al.*, 3 Paige, 614, it is held, if the wife unites with the husband in a mortgage of her real estate, merely as a security for the payment of his debt, she is entitled to have his interest in the estate, as tenant by the curtesy, first sold and applied to the payment of the debt, in exoneration of her estate in the mortgaged premises.

This equity of the wife was considered a claim paramount to that of a judgment creditor, who had but a general lien upon the husband's interest in the premises, subsequent to the mortgage. The wife having pledged her own estate for the husband's debt, was considered as a surety for the husband, and entitled to the same equitable rights as other sureties. Clancy,—Husband and Wife, 589,—sums up the rule as derived from the English cases, thus: "where the transaction is a mortgage by husband and wife, of her real estate, with a view to pay his debts, or to promote his interest, she will be considered, in equity, as a creditor for the money, and as entitled to have his personal assets applied in discharge of the amount; the court, looking upon him as the debtor, and on her land only as an additional security." In equity the wife must be considered as a distinct person from the husband; and, in a proper case may, by subrogation, be placed in the shoes of the mortgagee. *Patrick* v. *Pawlet*, 2 Atk. 383; *Aguilar* v. *Aguilar*, 5 Mod. R. 414.

By the charge of the court the wife was not to be protected beyond her reversionary interest in her lands, leaving the husband's interest, *jure uxoris*, subject to the claims of his creditors. It is true, the mortgage did not incumber but a part of the wife's lands, but we do not see that this should make a difference. Though the husband had acquired a life estate in all the real estate of the wife, as tenant by the curtesy initiate, and though chancery could not withdraw such

legal estate from the husband, for the purpose of making a separate provision for the wife and children, upon the ground that it was once her separate property, and he was likely to squander it; yet, as the wife's lands, that is, her reversionary interest, as well as her husband's life estate, were pledged for the husband's debt, she would stand in the nature of a surety for the husband, for so much as would be equal to the excess of the incumbrance above the value of the life estate of the husband in so much of the lands as were included in the mortgage. Standing as a creditor to the husband, for this excess, most clearly, then, it was right that the wife should be reimbursed such excess, upon the sale of her entire lands, though the money should be drawn from that portion of the consideration which might have been paid as an equivalent for the life interest of the husband in the lands not covered by the mortgage. Such portion of the consideration as was equivalent to the wife's reversionary interest, belonged to her. If, then, all that has been done is to secure to the wife, out of the consideration paid for these lands, a sum not exceeding her reversionary interest in them, most certainly there can be no ground of complaint. Though the husband and wife, and the grantees, had this object in view at the time of the sale, it furnishes no ground for the allegation of a *fraudulent intent*. It was precisely what the parties had a right to do; and it was proper in all respects that it should have been done. Judgment affirmed.

GILES HARRINGTON *v.* DECIUS R. BOGUE.

A sheriff is liable for taking insufficient bail on mesne process, and can only justify by showing that the bail was *amply sufficient* when taken. An apparent sufficiency will not justify him.

Quære—Whether an officer is liable for omitting to make a return of *nulla bona*.

THIS was an action on the case, in two counts, against the defendant, as sheriff of Franklin county, for the neglect of his deputies, in taking insufficient bail, and making an insufficient return upon the execution against said bail. Plea, general issue, and trial by the court.

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On the trial in the county court, it appeared that the plaintiff, in May, 1841, prayed out a writ of attachment against one James W. Grogan of the county of Franklin, demanding in damages $20, and delivered the same to John Barney, a deputy of the defendant, who, on the 15th of said May, arrested Grogan thereon, and took one William Cain as bail; that the plaintiff recovered a judgment in said action, against Grogan for $17.15 damages and cost, and took out execution thereon, and put the same into the hands of said Barney, who made a return of *non est inventus* thereon; that the plaintiff, thereupon, prayed out a writ of *scire facias* against Cain, which was served by attaching a cook stove as his property; that the plaintiff obtained a judgment in said action and took out an execution thereon, dated the 23d of September, 1841, and delivered the same to one A. P. Herrick, another deputy of the defendant, who, on the 22d of November, 1841, returned the same into the office of the justice issuing it, with the following indorsement thereon :—

"State of Vermont, Franklin county, ss., Oct. 6, 1841.

'Turned out to me on this execution, by William Cain, 'one cook stove. On the same day I posted said property 'for sale in fourteen days, and then by request of the defen-'dant I adjourned said sale, and made three adjournments, 'and on the 20th day of November then next, I exposed said 'property for sale, at public vendue, and sold said stove to 'Thomas Cain, he being the highest bidder, for $4.25, which 'leaves, after paying my fees, taxed at $1.60, the sum of '$2.65, to indorse on this execution, and I return this exe-'cution by mail, in part unsatisfied.'

Testimony was introduced by the defendant, tending to prove that Cain, at the time he became bail, was keeping a tavern, had a horse, wagon and other attachable property to the amount of one or two hundred dollars, and was in good credit in the neighborhood; and that he was sued after that time for about $100, and paid the debt.

It appeared that, in the fall of 1841, his attachable property was all sold on an execution issued on a judgment against him for rent, and that the original writ in the last mentioned case had been served by Barney previous to his taking Cain as bail in the plaintiff's suit. It also appeared that, at the time he was taken as bail, he owed more than he was worth.

The court found that there was no want of ordinary care and prudence in taking Cain as bail; that his apparent circumstances would readily give him a credit for a much larger amount than the plaintiff's claim, but that, in point of fact, he was insolvent at the time. They therefore decided that the sheriff was not liable for taking insufficient bail.

And as to the claim for damages on the ground of the alleged insufficiency of the return upon the execution, the court decided that the return was sufficient, and thereupon rendered judgment for the defendant.

To these decisions the plaintiff excepted.

Plaintiff, pro se.

1. Cain was *apparently* good when he was taken as bail, but in reality insolvent. A mere ostensible sufficiency will not excuse; it must be real, ample and substantial responsibility in point of property, and such as would probably continue so, to answer the demand. Statute, 183, sec. 32; *Hazard* v. *Slade*, D. Chip. R. 199; *Sparhawk* v. *Bartlet*, 2 Mass. R. 188; Big. Dig. 545, No. 5.

2. The plaintiff contends that the return of the defendant's deputy, Herrick, upon the execution against Cain, is bad; 1st, Because an officer when he follows the directions of the defendant in the execution, in taking property, is bound to take enough to pay it in full; 2d, The officer had no right to continue the sale of the property held on the execution, without some better excuse than the *request of the debtor*; 3d, The execution was not returned to the justice within sixty days from its date; 4th, The officer's return should set forth some good excuse for not collecting the balance of the execution. Big. Dig. 551–2. Damages are always implied where a want of official duty is shown. And if an officer is justified in neglecting part of his duty, without the plaintiff's proving special damages, he certainly would be shielded in case of a total failure, unless the plaintiff prove special damages. By this rule of law, an officer having an execution against two persons, would be justified in committing one, and making his return without naming the other, unless the plaintiff should prove special damages.

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Stevens & Seymour, for defendant.

1. The defendant contends that if the bail taken by his deputy, Barney, upon the original writ against Grogan was, when taken, apparently good, there is no negligence for which he is responsible. *Hendle* v. *Blades*, 5 Taunt. 225; (C. L. R. 86) 12 Mass. R. 127.

2. The claim, that an officer who levies an execution on the property attached, when by his duty obliged so to do, although the property is not of sufficient value to satisfy the execution, is thereby to be held bound to pay the whole amount of the execution, is absurd.

3. The officer made a sufficient return on the execution; and every reasonable intendment is to be made in his favor. 12 Vt. R. 195.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The first count in the declaration is for the neglect of the defendant's deputy, in not taking sufficient bail on a writ, in favor of the plaintiff against one James W. Grogan. The defendant defended the action by proving that the bail, William Cain, was, at the time he was taken as bail, apparently in good credit, and safe to be taken as bail, and was in possession of personal property to a greater amount than the demand of the plaintiff, against Grogan. The county court decided that, under these circumstances, the defendant was not liable, although they found that Cain, the bail, was actually insolvent, at the time he was taken as bail. This decision, we think, was erroneous. The statute, in relation to process, page 183, § 32, makes the officer answerable to the plaintiff, for all damages occasioned by the insufficiency of the surety, qualified, however, by this provision, that he may make it appear on trial, that, at the time of taking said surety, the same was amply sufficient. This statute can receive but one construction. The officer, when the bail proves insufficient, and he is sued therefor, can only defend himself, by proving that the surety, when taken, was *amply sufficient*. An apparent sufficiency will not excuse him. The decision in the case of *Hazard* v. *Slade*, D. Chipman, 199, was directly to this effect, under a statute in nearly the same words as the present. A similar decision was made in Windsor county, where one Willard was taken

as bail, who was apparently good when taken; and we are not aware, there have ever been any decisions to the contrary.

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On the second count, the court are not prepared to decide. My opinion is, that an officer is bound to return all writs of execution, unless they are in fact satisfied or executed; that the creditor has a right to require, that he should state, under his official oath, whether he has made diligent search, and whether he could find property of the debtor; and the presumption is, and should be, that he could execute and satisfy the writ, unless he returns an excuse therefor. The creditor is not bound to shew property in the possession of the debtor in order to charge the officer to whom he delivers an execution, unless it is to falsify a return of *nulla bona*. The court however are not prepared, at this time, to decide this point. As the county court rendered judgment for the defendant, and their decision as to the first count was erroneous, their judgment must be reversed.

JESSE PIKE *v.* HARRY HILL.

The judgment of a justice court, rendered after the suit has been discontinued by the failure of the parties to attend on the day appointed for the holding of the court, will be set aside by *audita querela*.

The justice record cannot be contradicted by parol proof.

AUDITA QUERELA, to set aside the judgment of a justice of the peace rendered on the 12th of September, 1840. On the trial in the county court, it appeared that the writ in the original action was served by attachment of property, Pike the defendant, being out of the state; and that the court was set at the justice's house, on the 25th of July, and the cause continued from time to time, until the 22d of August, for notice to the defendant. On that day, as appeared from the record of the justice, neither of the parties appeared, and he took no notice of the suit, until the day following, when, at the special instance of Hill, the plaintiff, he ordered the cause to be continued to the 12th September, at which time judgment was rendered against Pike, by default.

The record of the justice having been admitted, the defendant offered to prove, by parol, that said record was false,

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for that he did appear before said justice on the said 22d of August, and that said cause was continued by said justice on that day. This evidence was objected to, and excluded by the court; and thereupon judgement was rendered for the plaintiff. The defendant excepted.

——— ———, for defendant.

G. Harrington, for plaintiff.

The opinion of the court was delivered by

REDFIELD, J.—It has often been decided by this court that where judgment is rendered by a justice in a suit after it has been, in any manner, discontinued, the same will be set aside by *audita querela*. *Brown* v. *Stacy*, 9 Vt. R. 118; *Phelps* v. *Birge*, 11 Vt. R. 161; *Crawford* v. *Cheney*, 12 Vt. R. 567. A suit may be discontinued by the absence of the court, or of the parties. The latter appears, from the record, to have been the fact in this case. The suit was, therefore, discontinued on the 22d of August, and, consequently, the judgment rendered on the 12th of September is void.

The evidence offered to contradict the record of the justice was properly rejected. It was held by this court, in the case of *Barnard* v. *Flanders*, 12 Vt. R. 657, that the record of a justice of the discontinuance of an action was conclusive, though that was in a suit against the justice in which the record was used in his defense, and in which he was directly interested to make, as it was alleged he did, a false record. *A fortiori*, such record should be conclusive in this case.

Judgment affirmed.

Joseph Mott v. Giles Harrington.

(In Chancery.)

A master or commissioner is not obliged to make a special report, unless by direction of the court. Nor is he to report evidence.

The chancellor is not, on exceptions to the report, to review the proceedings of the master in relation to an account, or the items thereof. Nor will the supreme court, on appeal, review the decisions of the master on the evidence before him.

When a master was specially appointed, and the parties had agreed, previously, to refer the subject to him, on account of his knowledge of the subject in controversy, and it had been agreed that he might give an ex parte deposition, and send it to one of the parties, it cannot be made an exception to his report, that he had given such deposition.

The supreme court will rarely, if ever, alter a decree of the chancellor on the subject of cost alone.

Appeal from a decree of the court of chancery.

This was the case, originally, of a bill brought by the orator against the defendant, in which he alleged that in the year 1832, he conveyed to the defendant lots No. 49, 50, and 51, in the second range of lots in the town of Alburgh, and that the defendant at the same time executed to the orator, a bond, with a condition that he would reconvey the said lots to the orator, upon his paying the defendant the just charges he then had, or might thereafter have, as an attorney and solicitor of the orator in certain suits at law, and in chancery, and all bail bonds and executions in such suits, and also all claims of Heman Allen of Burlington, which were then due or might thereafter become due to him as attorney and solicitor of the orator in said suits; that he had paid to said Allen the amount of his claim, and tendered to the defendant $260 in satisfaction of his claim &c.; and praying that an account might be taken of the defendant's claims, and that he might be decreed to convey said lots of land to the orator, on payment of such sum as might in equity be found due.

The defendant in his answer admitted the execution of the deed and bond specified in the orator's bill, but alleged that it had been agreed between him and the orator that if he, the defendant would commence certain suits at law and in chancery, against the orator's sons, for the recovery of certain real estate, the orator would give him one half of

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the land recovered, and that, having commenced such suits and obtained for the orator the said lots No. 49, 50 and 51, the orator thereupon conveyed to him said lots for the purpose specified in the bill, and also to carry into effect said agreement to give defendant half the land recovered,—and insisting that he was entitled to be paid his costs and charges against the orator, and also to hold one half of said land.

The case was heard by the supreme court sitting as a court of chancery, at the January term 1840, of said court in the county of Grand Isle, when the court decided that the orator should be let in to redeem the premises; and it was ordered that it be referred to a master to take an account, and ascertain the sum due from the orator to the defendant. See report of the case, 12 Vt. R. 199.

Heman Allen, of Burlington, was, thereupon, appointed a special commissioner for that purpose, who at the May term, 1840, of the court of chancery for the county of Grand Isle, made his report, in which, after setting forth the items of account allowed by him to the defendant, he proceeded to say:

"The commissioner, of all the accounts and claims presented by the said Harrington against the said Mott, has, as above exhibited, allowed in favor of the said Harrington, the sum of *five hundred and thirty nine dollars and sixty one cents*, being justly due him from said Mott.

'In the course of the trial, the counsel for Joseph Mott called for the original book of entries and dockets of the said Harrington, and objected to the further proceeding in the hearing, until they should be exhibited in court, but as the books called for were not in court, but at Alburgh, and from the reading of the accounts of the said Harrington, the commissioner considered it not indispensably necessary to the investigation of the claims, that the books and dockets should be produced, in evidence, he, thereupon, overruled the objection, and allowed the parties to proceed.

'The counsel for the plaintiff further objected to the allowance of the three last items of the account, upon the ground that they did not come within the decretal order of the court, nor within the commission; but the commissioner overruled the objection, and allowed the three items as above.

'Objection was made by the orator to each and every 'item of the defendant's account."

Among the papers used as evidence before the commissioner, and referred to by him, and made part of his report, were the deposition of the said commissioner, taken in December, 1838, the answer of the defendant in this suit, with his account thereto annexed, and his account delivered to the orator before the commencement of the suit; and also the depositions of Tabor J. Sewall, and Clarinda Mott.

Upon the coming in of this report the orator filed his petition for its suppression, therein stating that the said Heman Allen was appointed commissioner upon the suggestion of the defendant; that previous to his appointment he had, at the solicitation of the defendant, given his deposition, *exparte*, in relation the defendant's services as solicitor for the orator in said suit in chancery, in which he had expressed an opinion favorable to the claim of the defendant; that, at the time of the appointment, the defendant had said deposition in his hands, and concealed the fact of its existence from the orator and his counsel; that the deposition was not filed in court, but was first produced on the trial before said commissioner, and that the orator and his counsel were, until then, wholly ignorant of its existence; that the defendant, by his management, procured the said Allen to be appointed as commissioner to take the account; that, upon the trial before the commissioner, the orator requested him to make a special report, stating the grounds of objection made by the orator to the defendant's account, which he refused to do; and that the defendant exhibited to the commissioner an account in many respects different from any he had ever before pretended to have against the orator.

The orator also filed exceptions to the report upon the following grounds: 1. That the commissioner neglected to return to the court the defendant's account, on which he adjudicated; 2. That he refused to order the production of the defendant's books and papers containing his charges; 3. That he allowed to defendant sundry sums of money as having been paid for the orator, without vouchers; 4. That he allowed a large sum for interest, without stating the grounds of allowance; 5. That the commissioner allowed many items which it was apparent from defendant's answer,

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ought not to have been allowed; 6. That he allowed large sums for time spent in going to different places, without specifying how much time was spent, or what was done for the orator; 7. That he allowed a gross sum of $15, for amount of Harrington and Perrigo's account against orator, without giving any items of said account, or having any items before him, and with no evidence but the defendant's oath; 8. That the commissioner allowed the defendant a large sum on account of a subject-matter not submitted to him by the decretal order; 9. That the report was grossly partial and unjust, &c.

Upon the hearing before the chancellor on the petition and exceptions, it appeared that, previous to the 1st of January, 1839, the following agreement had been entered into between Smalley & Adams, solicitors for the orator, and the defendant, viz:

"It is agreed that the evidence of Heman Allen, Esq. 'may be taken at Washington, D. C., and sworn to before 'a justice of the peace, and by him transmitted to the de- 'fendant, and be evidence in this cause. And the time for 'taking testimony is extended, by agreement, to the 1st of 'January, 1839."

Upon the hearing, Benjamin H. Smalley, one of the said solicitors, filed his affidavit, setting forth that the orator, from his great age and loss of memory was incapable of taking charge of said suit or giving directions in relation thereto, and that it had been managed by his agents, exclusively; that, at the time the court appointed Mr. Allen a commissoner, he, the deponent, had no knowledge that he had given any deposition, or any opinion in relation to said cause; that the defendant had, previous to said appointment, expressed to the deponent a wish that, if an account should be ordered by the court, the said Allen should be appointed to take the same, and that the deponent had, then, inquired of the defendant whether he had ever heard said Allen express any opinion on the subject, or had, by any means, ascertained his opinion upon it, and that the defendant assured the deponent that he did not know what said Allen's views were in regard to it; that the deponent attended at the hearing of the cause before the commissioner, and that the facts set forth in the orator's petition to suppress the report, were true,

according to his best knowledge and belief; that the first knowlege the deponent had of the deposition of Mr. Allen, was upon its production, by the defendant, as evidence, near the close of the examination before the commissioner; and that, at the trial before the commissioner, the defendant admitted that he had said deposition in his hands at, and before, the time when said Allen was appointed commissioner.

The deponent further stated his belief that it would appear by the defendant's books, if examined, that he had there charged the orator a much less sum than the commissioner had allowed the defendant in his report.

Henry Adams, also, the other of said solicitors, filed his affidavit, setting forth that he had no knowledge or suspicion, at the time said Allen was appointed commissioner, that he had given any deposition or opinion in relation to the cause, and had not heard or suspected the same, until after the hearing before the commissioner.

Upon the hearing, the chancellor accepted the report of the commissioner, and made a decree accordingly,—from which the orator appealed.

Smalley & Adams, for orator.

The appeal vacates the decree, and brings the whole case before this court; and every question arising therein is open to discussion.

I. As to the questions arising under the petition, and the exceptions.

1. The commissioner was incapable of trying the matter referred to him, having, previous to his appointment, expressed an opinion in favor of defendant's claims; which was well known to defendant. The appointment operated as a surprise upon the court and the orator, and ought to have been vacated. 2 Madd. Ch. P. 505.

2. The report of the commissioner ought to be set aside because he refused to state therein, the grounds of objection made by orator to defendant's claims, or to state any facts in relation to them, thereby taking upon himself to determine both the law and the facts, without the possibility of their being revised by the court. 6 Vt. R. 204; 5 Vt. R. 70; *Thompson* v. *Ames*, 9 Vt. R. 546; *Goodrich* v. *Drew*, 10 Vt. R. 137; Eq. Dig. 500.

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3. The commissioner refused to state in his report whether there was, or was not, any agreement by orator to pay interest, or whether there had been any demand of payment, thereby putting it out of orator's power to take the opinion of the court upon the question whether the orator was bound to pay interest. *Jones* v. *Jones*, 1 Jurist, 286; *DuBelloix* v. *Waterpark*, 16 Com. L. R. 12; *Woodbridge* v. *Proprietors of Addison*, 6 Vt. R. 204.

4. The commissioner refused to report the claims upon which he adjudicated. He should have done this that the court might know whether he exceeded his authority, and that it might determine whether the defendant would be entitled to cost, or ought to pay cost, for making an unwarrantable and oppressive demand. 1 Smith, 704; Bridgman's Dig. 162. sec. 6.

5. The commissioner exceeded his authority, and his report should therefore be set aside. *Lewis* v. *Loxham*, 1 Meri. R. 179; 2 Smith, 372. He was authorized to take the account annexed to the answer; but from his report, it appears that he adjudicated upon such claims as the defendant thought fit to present to him. He says, "Of all the accounts and claims presented, &c. he has allowed," &c. implying that claims not allowed, were presented. The court cannot know what the disallowed claims are, and the orator cannot be protected from future litigation in respect to them. The commissioner ought to have returned to the court a statement of the claims presented, as well those disallowed as allowed, that the court might judge of the character of the claims. 1 Bridg. Dig. p. 8. sec. 74; *Field et al* v. *Holland et al*, 2 Cond. R. 285.

6. The commissioner refused to order the production of the defendant's books and dockets containing his charges against the orator. The 8th section of the statute in relation to the action of account, provides that no disputed account shall be allowed upon the oath of the party, when it shall appear that he had an original book of entries, unless such book shall be produced upon reasonable request. In this case every item of the defendant's account was objected to. What is reasonable request for the production of the book is not matter of arbitrary discretion, but of law, to be determined from a consideration of the circumstances of each

case. *Prima facie*, the party making the request is entitled to have the books produced. Facts may exist, to warrant a refusal to order their production; but they should be stated in the report, or it will be set aside. 6 Vt. R. 204; 5 Vt. R. 70; *Thompson* v. *Arms*, 5 Vt. R. 546; *Goodrich* v. *Drew*, 10 Vt. R. 137; Eq. Dig. 500, sec. 6–7.

A strong reason for ordering the production of the books, &c., is derived from the nature of the transaction, out of which the account grew. It is an invariable rule in courts of law and equity, that all transactions between attorney or solicitor, and client, are to be rigorously investigated. 2 Bridg. Dig. 538, 541; 4 do. 460. In this case the defendant commenced acting as orator's solicitor and attorney, under an unconscionable and illegal contract, and during the existence of the professional relation, obtained an absolute conveyance from the orator, of a valuable real estate, which he has used for the purpose of extortion and oppressive litigation. Are the equitable powers of this court to be merged, in such a case, in a commissioner of their own appointing?

7. The commissioner omitted to state the grounds or facts upon which he allowed many contested items in defendant's account, of an extraordinary character. For example —"Time spent in going to Burlington, St. Albans, and other places, looking up testimony, $50." In *Bowman* v. *Earle*, 19 C. L. R. 266, it is said—"If in an action for an attorney's bill, it appears that the plaintiff, in his bill, charges for specific attendances on particular days, and besides that charges a further sum for several attendances, the judge at the trial, will direct the jury to deduct this latter sum from the amount of the bill." 1 Bos. & P. 49; *Eddy* v. *Hine*, 3 Vt. R. 389; *McConnel* v. *Pike*, 3 Vt. R. 596.

8. The commissioner erred in allowing $15 for "Harrington and Perrigo's account," without giving any items, and without stating from what cause it arose. Cond. Ch. R. 244.

II. The whole of the defendant's charges, for services as solicitor and attorney for the orator, in the suits against his sons, after the making of the agreement set forth in defendant's answer, for the conveyance to him, of half the land recovered, ought to be disallowed, being founded on an illegal transaction, clearly amounting to champerty. The defendant is not entitled to recover, in a court of law: 1

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Saund. P. & E. 199; Com. Dig. D. Attorney B. 14; *Thurston* v. *Percival*, 1 Pick. 415; Hobart, 117;—nor in a court of chancery: *Jones* v. *Tripp*, 4 Cond. Ch. R. 151; *Williams* v. *Pigott*, 4 Cond. Ch. R. 281.

This is not like a class of cases in equity, where purchases have been made by a solicitor of his client, and, on application are set aside, as having been obtained during the existence of the relation of solicitor and client, but ordered to stand as security for what was due, at the time the conveyance was made. The distinction is, that this was a mortgage, made to enable the defendant to enforce an illegal agreement. All the services of orator in the suits against the Motts, grew out of an illegal compact, and, therefore, there was nothing due, for which the mortgage can be deemed a security.

III. The defendant, by insisting upon an unjust claim, has prevented the adjustment of his account, and, therefore, should not be allowed interest. *Du Belloix* v. *Waterpark*, 16 C. L. R. 12; 2 Stark. 786; *Gillet* v. *Hall*, 13 Cond. R. 426.

IV. The defendant, having made an oppressive use of a security obtained under peculiar circumstances, and compelled the orator to come to this court for relief, ought to pay the costs of the application, and all costs which he has occasioned. 4 Bridg. Dig. 161, 173; *Brinkerhoof* v. *Lansing*, 4 J. Ch. R. 65; *Burnet* v. *Sanders*, 4 J. Ch. R. 503; 3 Pow. on Mort. 993, in note; *Nicholl* v. *Trustee of Huntington*, 1 J. Ch. R. 166; 1 Madd. C. P. 113; 2 Madd. 546; 3 Eq. Dig. 261; *Jones* v. *Loyd*, 10 Price, 62; *Elwood* v. *Pearce*, 21 C. L. R. 230, where more than a sixth was taken from an attorney's bill, and the court refused to allow him the costs of taxation.

G. Harrington, per se.

1. The finding of the chancellor on the petition, was upon matters of fact, and no error can be assigned. *Houghton* v. *Slack*, 10 Vt. R. 520; *Edgill* v. *Bennett*, 7 Vt. R. 534; 11 Vt. R. 233.

2. The taking and use of Allen's deposition is no ground for setting aside the report. It had been agreed by orator's counsel that it might be taken; and it appeared by the affidavit of Tabor J. Sewal, that the parties agreed to refer the

matter to Mr. Allen. He was appointed commissioner for the reason that his previous knowledge of the matter better enabled him to do the parties justice.

3. As to the non-production of defendant's books, it is doubtful whether the commissioner had power to order their production. But if he had, it was discretionary with him, and his refusal is no ground of exception. *Hill* v. *Hogaboom*, 13 Vt. R. 141.

4. As to vouchers, they were unnecessary, provided the commissioner was satisfied. *Warden* v. *Johnson*, 11 Vt. R. 455.

5. Allowance of interest. In the absence of any proof, appearing in the report, or by evidence, that the case did not authorize the allowance of interest, the court will presume it did. *Stoughton* v. *Lynch*, 2 Johns. 213; 41 Rule in Ch.

6. The fifth, sixth, and seventh exceptions to the report, refer to matters of fact, which are proper subjects for the commissioner's determination; and no proper objections were raised before the commissioner, on which exceptions could be founded. 3 Eq. Dig. 506, No. 17—507, No. 1, 6, 7, 9; 2 Smith, Ch. Pr. 164; New. Pr. 340.

7. The eighth exception is too general for the action of the court. Smith, Ch. Pr. 372; 3 Eq. Dig. 501, No. 8 & 9.

9. As to the objection to the defendant's claim, on the ground of its connexion with alleged champerty, he is not, for that cause, to lose his fair compensation for services and disbursements. 1 Eq. Dig. 293, No. 1—994, No. 7. 12. This objection was not made before the commissioner or chancellor.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This case comes before us on an appeal from a decree made by the chancellor for the third judicial circuit. A decree has heretofore been made by this court, as a court of chancery, before the present system was adopted. The decree was made on a full hearing, and it was referred to Mr. Allen, a commissioner specially appointed, to take the account between the parties. The questions which were settled by that decree we consider as not open for discussion. The only question now before us, is, whether the order of the chancellor, accepting the report of Mr. Al-

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len, and the decree thereon, shall be affirmed, reversed or altered. It is very obvious, that not every objection or argument which might have induced the chancellor to come to a different result, should be a ground with this court for reversing his decree. There are many orders made in the progress of a suit in chancery, depending on the discretion of the chancellor, and where he might, with propriety, have made a different order, which should not induce us to disturb his final decree in the premises. On an appeal, this court are to examine all the errors assigned, or found, in the decree of the chancellor, and make such a decree as justice shall require. Under a statute similar to ours, in the state of New-York, it has been holden that, on an appeal from chancery, to the court of errors, an objection not made by the party in the court below, cannot be made in the court of errors. Nor can a point, or question, be raised in the court of errors, for the first time, which, if it had been raised in the court below, might have been met and obviated. If the point, however, could not have been obviated by amendment, or proof, in the court below, and is fatal in the cause, the court of errors may examine into it. The party is not permitted to pass the court below, in silence, which would make this court, in fact, a court of original, instead of what it was intended, a court of appellate, jurisdiction.

In the case before us, objections are raised against the report of the commissioner, extrinsic, and which are presented by petition, and supported by affidavit, and intrinsic, arising on the report. The case of *Tyler* v. *Simmons*, 6 Paige, 127, decides that, in the state of New-York, irregularities in the proceedings of the master are not a proper subject of exception to the master's report; and this does not appear to be founded, solely, on rules of practice adopted in that state. But possibly the better practice under our system, would be for the chancellor to hear the objections, both extrinsic and intrinsic. When the case comes here, by appeal, the different objections would require a different consideration. The order of a chancellor founded on objections, not arising on the report, and which are to be proved by affidavit, or in any other way, directed by the chancellor, would rarely, if ever, present a case in which the order of the chancellor should be reversed. And this would afford a sufficient rea-

son why this decree should be affirmed, if there were no other objections to it, than those urged on the hearing of the petitioner.

As the practice under the present system of chancery jurisprudence, in this state, has not been settled by judicial construction, we have not been disposed, on this ground to pass by the objections urged on the petition of the orator, more especially as the same objections are mostly, raised on the report.

The first objection to the report is, that Mr. Allen, who was appointed a commissioner, had given an affidavit or deposition in the cause, in which he had expressed an opinion as to the merits of the controversy, that is, in relation to the nature of the controversy in which Mr. Harrington was employed as counsel. It appears, from an examination of the papers, that Mr. Allen was once employed by the orator, in conjunction with this defendant, in the prosecution of certain suits, in which the defendant claims a compensation. The orator must have known that Mr. Allen, from being associated with Mr. Harrington, must have some knowledge of the nature and extent of the services performed by Harrington, and whether he had been vigilant. The solicitor for the orator had agreed that the evidence of Mr. Allen might be taken at Washington, and sworn to before a justice of the peace, and by him transmitted to this defendant, and be evidence in this cause; and furthermore, by the testimony of Tabor J. Sewall, it appears, that the orator was well apprised of Mr. Allen's acquaintance with the subject in controversy, between him and this defendant, and had agreed with the defendant to submit the controversy to the decision of Mr. Allen. There is no ground, therefore, for the orator to complain, at this time, of the appointment of Mr. Allen, or allege surprise at his having given a deposition. Much less is there any foundation for the allegation in the petition, that "the defendant, by his *management*, in this suit, procured the said Allen to be appointed as commissioner to take the account," &c.

The other exceptions contained in the petition, relate to the neglect and refusal of the master to make a special report, to state the facts on which he allowed the claim of interest, and to return the account presented by the defend-

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ant. These objections may be considered with the exceptions taken directly to the report, and, in fact are enumerated among the special exceptions to it. These exceptions are nine in number, and are, that the commissioner neglected to return the defendant's account; refused to order the production of defendant's books; allowed sums without any vouchers; allowed interest without stating grounds; allowed many items which ought not to be allowed; allowed large sums for time spent, without specifying particulars; allowed an account in favor of Harrington and Perrigo on defendant's own statement; allowed sums on accounts not submitted, and that the report was grossly partial and unjust.

The two last exceptions are not supported by a reference to the proceedings before the master, nor by any proofs. The order to the master to ascertain the sum due to the defendant, required him to take into consideration the defendant's claim for taxable cost and fees in the suit mentioned; and there is no foundation for the allegation that the report is either partial or unjust.

The other exceptions may be embraced in two classes, and will be determined by ascertaining the power and duty of a master in chancery, as Mr. Allen was a special master in this case. They relate to the duty of the master in ordering the production of books and papers, in making a special report or statement of facts, and in stating the evidence in support of the different facts which he was required to find. The object of referring an account to a master is for convenience, to have a full investigation of facts, which could not well be had before the court, or, as was said in Bax, *exparte*, 2 Ves. 388, "because it is impossible for the court to take accounts originally, as that would so take up the time of the court, that justice could not be administered in other causes." Competent masters are appointed for this purpose, and the time and leisure which they can bestow upon the subject, enables them to investigate the facts, and state an account, more fully, and more for the benefit of the parties. The duty of a master is thus laid down by an eminent writer on the practice in chancery, Newland, 172, in which he is confirmed by Maddock and by Comyns, title Chancery, (W.2.) "The report of the master ought to be as succinct as may be, reserving the matter clearly for the judgment, and with-

out recital of the several points of the orders of reference, or the debates of counsel; nor is he to make a special report upon the importunity of counsel or of their clients, unless he is required by the court so to do, or his own judgment is satisfied with the propriety of it; and if he does, he is not to set forth the evidence with his opinion upon it, but only to state the bare fact, for the opinion of the court, in the same manner as in a special verdict." And when a master is required to ascertain a particular fact, he must draw the conclusion himself, and not report the evidence; as when it was referred to a master to ascertain whether a person was dead, who reported that he had been absent fourteen years beyond seas and had not been heard from, it was referred back to the master to report whether the person was dead. *Lee* v. *Willock*, 6 Ves. 605. A rigid adherence to these rules, and a firmness in resisting the solicitation to state numerous facts and the evidence, would save our records from much useless matter, and the court the unnecessary labor of selecting the true points in controversy from a multitude of unimportant facts, and testimony, with which reports of masters, referees and auditors, are too frequently encumbered. A reference to a master would be worse than useless, if the whole investigation of the account, the facts in controversy, and the evidence in support of, and in opposition to the same were to be re-examined before the chancellor, and then again be heard and litigated, as to all the items of account, before this court, on appeal.

This view of the nature of a reference to a master to take an account, and his duty and power in taking the same, obviates the several objections raised to the report. The master did not require the production of the books and accounts, because he did not deem it necessary to stop the inquiry and have them produced, or that they were required for the purpose of determining the controversy. Had he deemed them necessary, or proper, for that purpose, undoubtedly he would have required their production. He did not make a special report or statement of facts, because he was not required so to do, by the decretal order, and was not satisfied, in his own judgment, of the propriety of making such report. He did not state the evidence upon which

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he was convinced of the several facts by him found, or the ground on which he made certain allowances, because it would not have been proper for him so to do. And this disposes of all the exceptions which have been made to the report.

On a view of the whole case we can see no grounds, either in the petition, or in the exceptions to the report, why it should not have been accepted by the chancellor. It is sufficiently concise, and reports the sum due to the defendant; and a more particular report was not required, by the order of the court, nor by the difficulty or intricacy of the case. The decree of the chancellor in accepting the report, was, therefore, correct; and neither he nor this court can, with propriety, enter into an investigation, or examination, of all the claims or accounts which the commissioner was required to adjust.

An objection is, next, taken to the decision of the chancellor in allowing to the defendant the cost in this suit. As a general rule, undoubtedly the mortgagee is entitled to his costs on having his security redeemed. He may, however, be deprived of his costs, and, when his conduct is vexatious, he may be ordered to pay cost. When he sets up an unjust defence, insisting upon his deed as an absolute purchase, he may be deprived of his costs. I should have been well satisfied, in this case, if no costs had been awarded to the defendant. This was, however, a case where the allowance of costs was discretionary with the chancellor; and although I might have exercised this discretionary power differently, it would be no reason with me, for reversing a decree in this particular. Moreover, the general rule on this subject is, that there can be no appeal or rehearing, for costs only. This was decided by Lord Thurlow, in the case of *Herdman* v. *Kent*, 1 Brown, C. C. 140. This was stated to be the rule by Mr. Romily, in the case of *Jenour* v. *Jenour*, 10 Ves. 572, and recognised by Lord Eldon, in the case of *Taylor* v. *Popham*, 15 Vesey, 72; subject, however, to certain exceptions, which it is unnecessary to enumerate, as the case under consideration does not come within those exceptions. As the chancellor, below, thought proper not to allow cost to the orator, and the case was one where it was purely with-

in his discretion whether to allow cost or not, and his decree is not to be altered in any other particular, we do not think that, consistently with the rules of equity as to cost, on an appeal, the decree, in this particular should be reversed.

The decree of the court of chancery must, therefore, be affirmed.

ADDISON COUNTY.

JANUARY TERM, 1843.

PRESENT HON. STEPHEN ROYCE,
" ISAAC F. REDFIELD,
" MILO L. BENNETT,
" WILLIAM HEBARD,
} *Assistant Justices.*

TOWN OF STARKSBORO V. TOWN OF HINESBURGH.

The health ordinarily enjoyed by men of health, and the physical ability ordinarily possessed by men of sound bodies, constitute the "healthy and able bodied," within the meaning of the first section of the act of 1797, relating to legal settlement; and this, notwithstanding there may have been a casual and temporary illness, or bodily unsoundness, producing an occasional and temporary effect upon the capacity to gain a livelihood by bodily labor.

The deposition of a witness was taken, by reason of his disability to appear in court. He, nevertheless, appeared and testified on the trial. *Held*, that the deposition might be used as evidence in chief, in a subsequent trial of the same cause, the witness having, in the mean time, died; and that the admissible character of the deposition was not affected by a sworn repetition of the testimony the witness had given in court on the former trial.

THIS was an appeal from an order of removal by the town of Starksboro to the town of Hinesburgh, of one Lyman Bostwick and Rhoda Bostwick, his wife, made on the day of May, A. D. 1840. Plea, denying the settlement of the pauper in Hinesburgh, and trial by jury.

The plaintiff claimed the settlement of the pauper, Lyman Bostwick, in Hinesburgh, under the last clause of the first section of the act of 1797, on the ground that he resided there the term of one year, or more, while said act was in force, and that he was at that time, "*a healthy, able bodied person*, and of quiet and peaceable behavior." The appeal was entered in the county court, at the June term, 1840, and the cause was tried at the December term of that year. A new trial having been granted, it appeared on the subsequent

trial, that a short time before the said December term, the defendant took the deposition of said Lyman Bostwick to be read in the trial, for the reason that, by age and bodily infirmity he was rendered unable to attend court; that the plaintiff was notified, and attended, and cross examined the witness, and that the deposition was duly taken and certified, and opened in court.

It also appeared that, at the time of the trial of the cause at the said December term, the witness was in such a state of bodily infirmity, as to render the deposition admissible, had the witness not been produced.

It also appeared that the plaintiff took the deposition of said Bostwick, about the same time, to be also used on the trial of the cause; and that, on notice, the defendant appeared at the taking, and cross examined the witness.

It appeared, also, that, at the trial of the cause, at said December term, Bostwick was produced by the plaintiff as a witness, and testified; and that after he had been examined in chief, and without any cross examination, the defendant's counsel insisted that, as it appeared from his testimony, that Hinesburgh was not the town in which he first resided one full year, he could not have gained a settlement there, and that the defendant was not required to go into a defence; but, that if the court should decide otherwise, then the defendant claimed to be allowed to go into evidence by way of defence, and to cross examine the witness. The cross examination was suspended, with this conditional leave of the court, and the court decided that the evidence was not sufficient to sustain the order of removal, and thereupon directed a verdict for the defendant.

The plaintiff, at the second trial, offered to prove what the said Bostwick testified in the former trial of the cause—it appearing that he had, in the mean time, deceased—to which the defendant objected, on the ground that the deposition taken by the plaintiff was the best evidence, and that the plaintiff was bound to produce it—notice having been given by defendant to plaintiff, before the session of the court, to produce the same on trial. The court overruled the objection, and admitted the evidence, which tended to show that Bostwick moved into Hinesburgh in 1797 or 1798, and resi-

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ded there till March, 1802, and that, during that time, he was a healthy, able bodied man, with the exception of a slight rheumatism, which occasionally affected him. The plaintiff also gave evidence tending to show, that the pauper, during his residence in Hinesburgh, supported himself by his labor, and was of quiet and peaceable behavior.

The defendant introduced testimony, tending to show that Bostwick, during his said residence in Hinesburgh, was not a healthy, able bodied man—that during his whole residence there he was afflicted with a lameness in the hip, which rendered him unable to labor, except at some kinds of light work, and often, entirely disabled him; that said lameness was of a permanent character, and increased until it terminated several years before his death, in an entire stiffness of the hip joints, and disabled him so that he could walk only with crutches; and that he died of said disease.

The defendant also offered in evidence the said deposition of Bostwick, taken by the defendant, which was objected to by the plaintiff, but admitted by the court, as evidence only so far as it was inconsistent with, and went to impeach the testimony of Bostwick, as given in evidence by the plaintiff, but not as evidence in chief, as the defendant claimed that it was entitled to be received.

The counsel for the defendant requested the court to charge the jury—

1. That, in order to entitle the plaintiff to a verdict, the plaintiff must show that the pauper resided in Hinesburgh, while the statute of 1797 was in force, one full year, and that, during such year's residence, he was a healthy, able bodied man; and that the burden of proof, as to his being such healthy, able bodied man, was upon the plaintiff.

2. That, in order to constitute the pauper a healthy, able bodied man, within the meaning of the statute of 1797, he must, during such year's residence, have been in full strength, enjoying continued health, uninterrupted by disease.

3. That if the jury should find that the pauper, during such year's residence, had a disease or lameness upon him which, at periods, rendered him unable to labor, then he was not a healthy, able bodied person, within the meaning of the statute.

4. That if they should find that during such residence, he

had a disease, lameness, or infirmity, upon him, of a permanent character, and which but occasionally rendered him less able to labor, then, he was not a healthy, able bodied person, within the meaning of the statute, even if they should find that, taking the whole period of such year's residence, he performed as much labor as healthy, able bodied men in general.

5. That, if they should find that, during such residence, he was able to perform, and did perform, as much labor as healthy, able bodied men, in general, and this, too, without interruption by sickness or disease, and also find that, during this period he had upon him a lameness or chronic disease, which, from its nature and tendency, would be likely to render the town more liable to become chargable with his support, or would be likely to increase, and ultimately disable him, or render him of less ability to gain a livelihood by labor, or did so terminate, then he was not, at the period of such residence, a healthy, able bodied person, within the meaning of the statute, although, at the particular period of such residence, he was not thereby rendered the less able, either in point of health or physical ability, to labor, or thereby gain a livelihood.

But the court instructed the jury that, if Bostwick resided in Hinesburgh for the term of one full year, while the portion, in question, of the act of 1797 was in force, and in the ordinary health which is commonly enjoyed by others in health, and possessed of the physical and bodily ability which men of sound bodies ordinarily possess, he would have gained a settlement under that act; and that this effect would not be prevented, though the pauper might, in the course of such year, have a casual and temporary illness, or bodily unsoundness, which produced an occasional and temporary effect upon the character and capacity of the pauper to gain a livelihood by his bodily exertions; but if they should find, on the other hand, that the pauper was, at any time during such year's residence, laboring under some permanent disease or disability of his bodily powers, which eventuated in substantially and materially diminishing his capacity to acquire, at any subsequent time, a support for himself and family, in consequence of it, he was not that healthy able

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bodied person, which the law required, and could not gain a settlement in Hinesburgh by the year's residence.

The court further charged the jury, that the deposition of Bostwick, was not to be regarded as evidence in chief, and as proving the facts therein testified to, but was to be taken as evidence, only so far as it was inconsistent with, and tended to impeach the testimony of the same witness, as given at the previous trial, and now testified to. The jury returned a verdict that the pauper was duly removed.

To all which decisions, and charge of the court, and refusal to charge as requested, the defendant excepted.

Hyde & Peck, for the defendant.

I. The deposition of Lyman Bostwick, was admissible as evidence in chief, as a deposition under the statute, having been regularly taken, for a cause specified in the statute—the disability of the witness, which continued up to his death. This event did not destroy its admissibility. The production of the witness by the plaintiff, when he was too infirm to be required to attend, cannot prejudice the defendant. It did not *destroy*, but only *suspended*, his right to use the deposition. The witness being dead, the deposition, with the aid of the statute to show it was judicially taken, is admissible at common law. Judicial examinations by public officers are also admissible, when the party had no notice or opportunity to cross-examine the witnesses, upon the ground that the examination being taken by a public officer, the testimony is presumed to have been fully and impartially taken. Phil. Ev. 363–68–72–76–78; 1 L. Ray. 219–22; 3 Barn. & Al. 121; 2 Bac. Ab. 625; Gil. Ev. 56; 1 Stark. Ev. 310 (7 Am. from 2 Lond. ed.) Arch. Pl. 398—(2 Am. from last Lond, Ed.) Bul. N. P. 239; *Fry* v. *Wood*, 1 Atk. 445; *Benson* v. *Clive*, 2 Strange 929; *Kinsman* v. *Crooke*, 2 L. Ray. 1166

A repetition of the testimony of a deceased witness is admissible in evidence, upon the supposition that the adverse party has either actually cross-examined the witness, or had an opportunity to do so, which he had voluntarily waived. The court having decided against the plaintiff, upon another point, upon his own showing, without any cross-examination, the testimony of the witness was incomplete, and the

defendant cannot be said to have had a legal opportunity to cross-examine.

The rule which admits parol evidence of what a deceased witness testified on a former trial, rests on the necessity of the case, and is confined to cases where the words of the deceased witness can be proved. The substance of his testimony is not admissible; and even under this strict rule courts have always considered it a dangerous species of testimony, and judges have regretted that it was ever admitted. See Lord Palmerston's case cited by Lord Kenyon, in *The King* v. *Jolliffe*, 4 T. R. 290. In *Ennis* v. *Donisthorne*, Lord Kenyon says, "he ought to recollect the very words, for the jury alone can judge of the effect of words;" See Phil. Ev. 231, n. 3; *Wilbur* v. *Selden*, 6 Cowen R. 162; *Lighter* v. *Wike*, 4 Serj. & Rawle, 203; 4 Bac. Abr. 625. In this view of the subject, the deposition was evidently the *best* evidence—which the law requires should be produced.

In the provision of the statute of 1797, which gives a settlement by one year's residence, without any other requisite, to "*every other healthy, able bodied person*," health and physical ability, are indispensible, and constitute the very capacity of the pauper to gain a settlement. The burden of proof was on the plaintiff, as to this point, as well as on the question of residence, and the court erred in not so instructing the jury, when requested.

As to the construction of the words "*healthy, able bodied person*," we insist that, as the residence must be continuous, so must the health and physical ability of the pauper be continuous and uninterrupted, as they are equally requisite, and without them, the pauper has no capacity to gain a settlement by residence. Statutes, relative to settlement, like penal statutes, have always been construed strictly. This construction is the more to be favored, as the period of residence is short. Any other construction would destroy all rule on the subject. *Middletown* v. *Poultney*, 2 Vt R. 437. The defendant, therefore, was entitled to a charge, agreeably to the 1st, 2d, and 3d, requests.

If a temporary illness would not prevent a settlement, yet if, "during such residence," he had a disease, lameness, or infirmity upon him of a *permanent character*, and which but

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occasionally disabled him, he was not a "*healthy, able bodied person.*" Defendant was therefore entitled to a charge, agreeably to the 4th request.

If, during his residence, the pauper had a lameness or chronic disease, permanent in its character, the nature and tendency of which would be to render him likely to become chargeable, he was not a healthy, able bodied person, although it did not disable him at any time during the particular period of his residence. The statute looks to the security of the town beyond the period of the residence, otherwise it would have provided that any one should gain a settlement, by merely residing one year, and supporting himself. The court ought, therefore, to have charged according to the 5th request.

The charge is erroneous. That part of it, in which the court told the jury that if the pauper was "in the ordinary 'health which is commonly enjoyed by others in health, and 'possessed of the physical and bodily ability, which men of 'sound bodies ordinarily possess, he would have gained a 'settlement," is no definition of a healthy, able bodied person, and is equivalent to no charge on this point.

The charge does not give the "*permanent disease or disability*" the effect of preventing a settlement, unless it actually "*eventuated*" in diminishing the capacity of the pauper to acquire a support at a subsequent period. Under this charge, the pauper may have been under this "permanent disease or disability" during his whole residence, and yet have gained a settlement, unless it eventuated in diminishing his capacity to acquire a support at a "*subsequent time,*"—so that if he was not a healthy, abled bodied person, during such residence, yet if he recovered at the end of this period, he would have gained a settlement.

E. D. Barber, for the plaintiff.

I. Evidence of what a deceased witness testified on a previous trial, is admissible, on a subsequent trial. 1 Stark. Ev. 265, and n. z.; Bul. N. P. 295: 3 Taunt. 261; 3 Wend. 251; 6 Cow. 165; 12 Vt. R. 427.

The testimony of Bostwick, on the stand at the time it was given, was the *best testimony*, and the deposition was not then admissible. 1 Stark. Ev. 108, 261–2. If it was,

then, testimony of a higher nature than the deposition, so was a sworn repetition of it, after the death of the witness. By being admitted, subject to all the objections of the opposite party, and to a cross examination, if he chose to make any, it became testimony in the case. The deposition, though taken to be used as testimony, had never been used, and had not, of course, become testimony, and might not have become so, under the direction of the court. The claim on the part of defendant was, then, that the court should reject evidence of that which had become testimony, on the previous trial, and substitute that, as the testimony of the deceased witness, which was not testimony at the time he testified.

If it be said that the witness, on the previous trial, was not cross examined, and thereby defendant lost one of the usual tests of credibility, it is sufficient to reply, that defendant had an opportunity to cross examine, and if he neglected to do it, or for any reason waived his right to do it, he is concluded by such neglect or wavier. 1 Stark. Ev. 272–3; 1 M. & S. 4; *Bell* v. *Thompson*, 18 Com. Law Rep. 302.

II. Did the court err in excluding the deposition of Bostwick, excepting so far as it was inconsistent with, and tended to impeach his testimony on the stand? If the sworn repetition of that testimony was properly admitted, the deposition was admissible only to impeach it. If that deposition might have been used as evidence in chief, might not also the deposition taken by the plaintiff? And yet *that* would have been inadmissible. 1 Stark. Ev. 275–8, n. *t*.

Again: If the deposition was admissible as evidence in chief, because taken according to the form required by statute, under the sanction of an oath, and between the same parties, and subject to the cross examination of the opposite party, upon the same principle, what a witness testified to on a previous trial, would be evidence in chief in a subsequent one, although the witness should be present and testify. But according to the authority just cited, it is admissible only for the purpose of impeaching his testimony on the subsequent trial. 1 Stark. cited above.

III. Did the court err in the charge as to what would constitute the pauper *a healthy, able bodied man*, within the meaning of the act of 1797?

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The legislature intended, undoubtedly, to make health and bodily strength, and peaceable behavior, combined, as good a qualification for a settlement, as the other requisites provided by the statute; and, inasmuch as the terms "healthy, able bodied" are relative terms, and do not, of themselves, *purport health, strength and soundness of body*, the only construction which could reasonably be given the statute, in relation to these terms, was the one given by the court below. The statute intended to exclude those, only, from gaining a settlement by this provision, who had such a disease or bodily disability upon them, at the time of their residence, as would eventually diminish, or destroy, their capacity to support themselves, and those who derived settlement from them.

Royce, J.—After stating the case, proceeded to deliver the opinion of the court as follows:—I shall first consider the objections taken to the charge of the judge. The question was, whether Bostwick, the pauper, acquired a settlement in Hinesburgh, under the last clause of the first section of the act of A. D. 1797, by residing in said town for one year, and being, in the language of the act, a "healthy, able-bodied person, and of quiet and peaceable behaviour." The previous parts of that section had provided various modes of gaining a settlement, all having reference to the ownership or possession of property, the payment of taxes, the discharge of town offices, or other qualifications, not necessarily involving the consideration of bodily health and strength, or of personal disposition and conduct. And it seems to have been the design of this concluding part of the section, to furnish a mode sufficiently comprehensive to embrace all other adult persons, who should demean themselves as inoffensive and wholesome citizens, and who might reasonably be expected to support themselves and families by personal labor; and, in most employments, the appearance of, at least, ordinary health and strength could alone justify such an expectation.

It may be remarked, in reference to the qualifications necessary to satisfy the descriptive words of the statute, that, whilst on the one hand, no person should be regarded as healthy and able-bodied within the act, who, from a feeble state of

general health, or from any local disease or infirmity, was incapable of pursuing efficiently those branches of industry which the legislature had mainly in view; so on the other, those words should not receive a construction which would operate unreasonably to lessen the number of persons for whom this provision of the law was designed. In our opinion, then, it was not required that a healthy person, within the meaning of the act, should invariably continue *in health* throughout the year, nor that an able-bodied person should remain wholly exempt from those accidents which, for a time, would impair his physical energies. It must be enough if the words of the statute could fairly be predicated of the person in his usual and habitual condition. And we think the charge of the judge was substantially in accordance with this view of the subject. The jury were instructed that if the pauper, during the year of his residence in Hinesburgh under the act of A. D. 1797, was "in the ordinary health which is enjoyed by others in health, and was possessed of the physical and bodily ability which men of sound bodies ordinarily possess," he would have gained a settlement; and that this effect would not have been prevented, though he might, in the course of that year, have had "a casual and temporary illness, or bodily unsoundness, which produced an occasional and temporary effect upon his capacity to gain a livelihood by his bodily exertions." The words of the statute are here justly treated as relative expressions, having for their standard the ordinary condition of those who regard themselves, and are regarded by others, as healthy and robust persons, possessing their physical powers uninjured. It is objected, however, that the supposed exceptions to this condition of the person were not sufficiently defined and limited by the judge, and therefore may have been applied by the jury to a considerable portion of the year. But this objection loses its force when the charge is understood with a proper reference to the evidence. If any such exceptions existed during the year, they were but occasional, and of short duration. The remainder of the charge upon this part of the case might be liable to objection, considered as a rule of general application, but, as applied to this particular case, it was not calculated to lead to any improper result. It related to the question, when the rheumatic disease, of which

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the pauper finally died, became fixed upon him as a permanent disease. And what was supposed by the judge, as to its subsequent effect, in rendering the pauper less able to support himself and family, was doubtless intended rather as a description of the actual consequences in that instance, than as a test by which to determine the importance of the fact, provided the disease did exist as a permanent one within the year. We think the jury could not have felt themselves at liberty, under the whole charge, to find a settlement in Hinesburgh, if they believed that the disease had become fixed and permanent at any time within the year.

The remaining questions to be considered relate to the admissibility and effect of certain testimony which is noted in the bill of exceptions. The deposition of Bostwick is conceded to have been regularly taken, and for sufficient cause, within the statute. It, therefore, became legal testimony, in the necessary absence of the witness. The unexpected attendance of the witness at the term for which the deposition was taken, suspended the use of it for that term, but did not affect it as competent testimony at a subsequent term, when the witness could not attend. Nor could the admissible character of this evidence be affected by a sworn repetition of the testimony which the witness had given in court. It would require the witness himself to keep out the deposition, and not merely his former testimony received at second hand. We regard both as legally admissible; the former, as testimony expressly authorized by statute, and the latter, as a kind of evidence sanctioned by authority under such circumstances. And if admissible, like other evidence, it follows that neither could properly be treated as mere impeaching testimony, and not as evidence in chief. The distinction, in this respect, is between testimony which is admissible for the direct purpose of proving facts in the cause, and that which is not so. And as an illustration, I allude to the proof of what a witness on the stand has previously sworn in the same cause. This is but impeaching testimony; and the reason is, that the witness being still alive, no rule of law will sanction the introduction of such proof as primary and direct evidence. It therefore cannot be received, under such circumstances, to prove any fact thus previously sworn to, but only to affect the present credit of the witness.

There is no occasion to pursue the subject farther. We are all of opinion that the decision of the county court, limiting the effect of the deposition to that of mere impeaching testimony, was erroneous; and for that cause the judgment below is reversed.

BENJAMIN HALE, JR., *v.* EPAPHRAS MILLER.

Where an officer sells property on execution to the creditor, and his return appears regular, it is not competent for the debtor in the execution to bring trover against the creditor, on the ground of any irregularity in the proceedings of the officer, although the creditor himself may have advised it.

The only proper remedy for such an injury, is by action on the case against the officer.

THIS was an action of trover for a traverse sleigh, a lumber sleigh, and other articles of property.

The action was originally brought before a justice of the peace, by whose record it appears that, after the appearance of the parties and a continuance of the cause, and the impannelling of a jury for the trial of it, the defendant plead in abatement, the non joinder, as plaintiffs, of two other individuals, as joint owners of the property in question.

The case came up, by appeal to the county court, where the same plea was interposed by the defendant, and overruled by the court, to which decision the defendant excepted. The general issue was thereupon joined to the court.

The plaintiff offered evidence tending to prove, that, in the fall of 1840, the defendant put two executions in his, the defendant's favor, against the plaintiff and Samuel Hale and Benjamin Hale, Sen., into the hands of Harvy Goodrich, constable of the town of Middlebury, with directions to levy the same on the property in question; at which time the defendant requested the said constable to post said property for sale at a certain red house in the village of Middlebury, formerly occupied by the debtors in said execution, which house was, at that time, unoccupied, and was the last house in said village, on the Rutland road, about eighty rods from the Vermont Hotel; that said constable told said defendant, that he should post up his notification of said sale at

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the said Vermont Hotel, and suggested to him that said hotel was the best place for the sale of said property; that the defendant did not acquiesce in said suggestion, alleging, as his only objection, that all the property was at said red house except one or two articles of small value, which it would be easy to transport there; that said constable posted up his notification at the Vermont Hotel, giving more than 14 days' notice, that the property in question would be sold at said red house; that, on the day of the sale, said constable again suggested that said property would sell better at the Vermont Hotel, to which the defendant replied that he had no objection, except that his hired man had gone away with his team, and it would be considerable trouble to remove the property to said hotel; that the sale was had at said red house, and that the defendant, a son-in-law of the defendant and three other persons, neither of whom was either of the debtors in said executions, were the only persons present, at said sale, beside the said constable; that said constable and said defendant went out together once to request individuals to attend the sale, and that the same was delayed some time for persons to come; that during the sale, said constable remarked to defendant that the property was not bringing as high a price as it ought to bring, and that he supposed he had a right to bid once; that said defendant replied that said constable might bid as much and as often as he pleased, for all that he cared; that said constable then bid off the lumber sleigh in question and took said sleigh away; that immediately after said sale, the defendant's son-in-law made over his bids to the defen- dant, and that the defendant took the property so bid off by him.

The court thereupon rendered judgment for the defendant; to which decision the plaintiff excepted.

O. Seymour, for the plaintiff, having argued in support of the decision of the court below, on the plea in abatement, proceeded to argue that the proceeding to dispose of property without the authority of law, and against the will of the owner, is a conversion. A sheriff's sale, under a valid execution, if irregularly and illegally conducted, is a conversion of the property sold, and the plaintiff in execution is equally liable with the officer if he, (the party) directs

the sale. *Barnard* v. *Stevens et al.*, 2 Aik. R. 429; 2 Day. R. 317.

The officer's sale in this case was irregular and illegal, because—1. The case shows, that the property was not sold at a public place, nor at the place where it was posted. Revised Statutes, p. 239, chap. 42, sec. 4. 2. The case shows that part of the property in question was bid off, and taken away by the officer, which was illegal, and, of itself, a conversion, 5 Conn.R. 475.

E. D. Barber, for the defendant.

This sale, if irregular, which we do not admit, was not, therefore, *ipso facto* void. The purchasers, under it, could not be affected by the irregularity, but the officer would be liable therefor to the party injured. *Admr. of Janes* v. *Martin*, 7 Vt. R. 92; *Bates* v. *Carter*, 5 Vt. R. 602; *Gates* v. *Gaines*, 10 Vt. R. 346. If the sale was not void, the title to the property passed to the purchasers, and there could be no conversion by them.

A creditor in an execution may be a purchaser at a sheriff's sale upon it. 4 Taunt. 822; 10 Vt. R. above cited.

If the return of the officer is regular, on the face of it, it is conclusive to pass the title, and cannot be impeached or contradicted. *Swift* v. *Cobb and others*, 10 Vt. R. 282. The return, in this case, is regular, and if there is any illegality or any fraud or collusion in the sale, the debtor in the execution has no action except against the officer, for a false return, *Livermore* v. *Bagly*, 9 Mass. R. 487, or an action on the case under the statute, chap. 42, s. 8. If trover is not the proper remedy against the officer, *a fortiori*, it cannot be against the creditor for a participation in the officer's doings. If there is any remedy against the defendant, it must be sought in another form of action.

The opinion of the court was delivered by

REDFIELD, J.—This is an action of trover for certain property sold on execution in favor of the defendant against the plaintiff. It is alleged that the proceedings of the officer were so irregular as to render the sale void, and the officer and creditor liable in this form of action.

The irregularity complained of, is, that the officer, by the

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consent and direction of the defendant, who was creditor in the executions, advertised the property to be *sold* at a different place from that at which it was *advertised*, but both in the village of Middlebury. Not to determine, whether, within the purview of the statute, the village of Middlebury is to be considered as the *same public place*, it is obvious that the plaintiff's proper remedy is an action on the case, for any injury he may have sustained, in this behalf. For the return appears regular, on its face, in this respect, and cannot be contradicted by the parties to it, except by an action for a false return. The sale being regular, the title to the things sold is transferred to the purchaser; and he being the creditor in the execution, makes no difference—as has been often decided. He is not, in general, responsible for the official acts of the officer, even although he advised them. The officer must see to it that he do not take bad advice in regard to his official proceedings; and if he do take such counsel, he alone is responsible for his acts, and that in a proper action on the case.

Whether the officer can make title to the property, which he himself bid off, as against the plaintiff, who was debtor in the execution, is not necessary now to be determined. For one, I think he could not. His return shows a sale to himself, which, in law, is as no sale; but this is not determined. There is nothing in this case to show that the defendant did any thing to induce the officer to become a purchaser, except what he or any other person might well do. He did not forbid him, but told him he did not care how many times he bid. He could not hinder his bidding. He was not bound to advise him and did not. This renders it unnecessary to examine into the plea in abatement.

Judgment affirmed.

R. & J. WAINWRIGHT v. CYRUS G. STRAW and WILLIAM CUNNINGHAM.

A stove was sold for a given sum, payable in cattle or grain, at a future day. *Held*, that, after a breach of the contract, a recovery might be had upon a general count for goods sold and delivered.

To bring a case within the statute of frauds, it is necessary that the undertaking should be collateral to, and in aid of, the promise of another.

A note promising to pay J. & Wainwright a given sum in one from the first of October following the date, in cattle, or in grain the first of January following, was held void, for uncertainty.

A mere agent or servant, may be a witness for his principal, from public convenience and necessity.

THIS was an action of assumpsit, brought to the county court by appeal, in which the plaintiffs declared in two counts upon a note of hand, of which the following is a literal copy.

"For value received, we jointly and severly promis to 'pay J. & Wainwright or order, thirty eight dollars and 'fifty four cents worth cattle in one from the first of Oct. next, 'cattle over eight years, bulls and stags exemt, or merchble 'grain by the firs of January following, with use, payable at 'R. Russels now dwelling house." CYRUS G. STRAW.

Richmond, May 5, 1838. WM. CUNNINGHAM.

The first count declared on the note as payable to "the plaintiffs by the name of J. & Wainwright, in cattle in one year from the first day of October next after the date of said note, or in grain by the first day of January following."

The second count declared on the note as payable to "the plaintiffs, by the name of J. & Wainwright, in grain by the first day of January following the date of said note."

To these counts there was added a general count for goods sold and delivered.

Plea, general issue, and trial by the court.

The plaintiffs offered the deposition of Reed B. Brown, in which he testified that, in the months of April and May, 1838, he was an agent of Rufus & Jonathan Wainwright for the sale of stoves; that on the 5th of said May, William Cunningham & Cyrus G. Straw, came to him and said they wished to buy a stove for Straw, but that both would be responsible to R. & J. Wainwright for the pay; that it was on their joint responsibility that he sold the stove; that they

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agreed to pay for the stove and pipe which he then sold them, the sum of $38.54 in cattle, in one year from the first day of October then next, cattle over eight years old and bulls and stags exempt, or merchantable grain by the 1st of January next thereafter; that the note attached to said deposition and marked A. [see copy above] was written by the deponent and signed by said Straw & Cunningham in his presence, at that time; that the note was intended to have been written according to the contract as thus stated; and that he intended to have drawn it payable to R. & J. Wainwright. He further testified that he had no interest in the result of the suit.

The deposition was objected to by the defendants, but was admitted by the court. The court rendered judgment for the plaintiffs, on the general count, and decided that the note did not support the special counts in the declaration. The defendants excepted.

E. D. Barber, for the defendants.

1. The note offered in evidence did not sustain either of the special counts; but it is a valid and subsisting obligation on which a recovery can be had, if declared on according to its legal effect; or if declared on in its terms, the court will give it operation according to its legal effect. It is not void, as was the note in the case cited from D. Chip. R. See Chit. on Con. 79. n 1. If it is to be regarded as payable to a fictitious person, it may be declared on as a contract to pay to bearer. 3 Term R. 174.

2. The court erred, then, in permitting a recovery upon the common count for goods sold and delivered. If the deposition of Brown was properly admitted, it appears that no account was ever made of the stove, for which the note was given. The stove was exchanged for the note, which was received and treated as a payment; and the recovery must be had upon that, if at all. Chit. Con. 593; *Kirslake* v. *Morgan*, 5 Term R. 513; *Stedman* v. *Gooch*, 1 Esp. 3; *Hutchinson et al.* v. *Olcutt*, 4 Vt. R. 549; Chip. on Con. 19, 20; Bray. 203.

If Straw's note would not, without an express agreement, have operated as a payment for the stove which was purchased for him, the procuring and giving the note of a third

person is a payment *per se*. *Curtis* v. *Ingham*, 2 Vt. R. 290; *Whitbeck* v. *Vanness*, 11 Johns. 409; 2 Esp. 571.

3. But, laying the note out of the question, it appears that the goods were delivered under a special contract, and the general count, under the circumstances of the case, cannot be sustained,—

First. Because, when goods have been sold and actually delivered under a special agreement, the general count cannot be sustained, unless the contract was to pay in money, and the credit has expired. 1 Chit. Pl. 338; *Musson* v. *Price*, 4 East. 147; *Brooke* v. *White*, 1 New. Rep. 330. And if the contract was to pay partly in money, and partly in goods, the general count cannot be sustained, if the term of credit has expired. 1 Chit. Pl. 338. *A fortiori*, if the contract was to pay wholly in goods, and in the alternative, the count must be special. 2 East. 2; Ibid. 4, note; 3 Term R. 531.

Second. Because the general count can only be sustained when the proof is adapted to it. It can never be allowed when, in truth, the goods were delivered under a special contract, and where the plaintiff proves that special contract, and might recover upon it with a special count. 2 Stark. Ev. 95–6, note 2; *Robertson* v. *Lynch*, 18 Johns. 456; *Robson* v. *Godfrey & Thomas*, 3 Com. L. 85. The special contract, as proved, being still in force, unrescinded, the claim must be damages for the breach of it; and the plaintiff cannot resort to the general counts. *Raymond et al.* v. *Barnard*, 12 Johns. 274; *Jennings* v. *Camp*, 13 Johns. 94; *Clark* v. *Smith*, 14 Johns. 326; *Russell* v. *S. Britain Society*, 9 Con. 508; *Shepard* v. *Palmer*, 6 Con. 95; *Vandenheuvel* v. *Storrs*, 3 Con. 202; *Way* v. *Wakefield*, 7 Vt. R. 223. The law will not *imply* a promise when there is an express one.

4. But the deposition of Brown was inadmissible,—1. Because it could not be used to explain the patent ambiguity in the note. 3 Stark. Ev. 1000; *Storer* v. *Freeman*, 6 Mass. 435; 2. Because it was not admissible to prove the terms of a written agreement; 3. Because the witness was interested. If the deposition of Brown was not admissible, there was no proof under the general count, except the note; and that was insufficient to prove the sale and delivery.

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5. Cunningham cannot be charged, under the general count, because his undertaking is a collateral one, and within the statute of frauds. If the note is treated as a writing to take the promise out of the statute, then the recovery must be upon the writing, and the count must be special. 1 Chit. Pl. 302.

If Brown's deposition is admissible, and the note is out of the question, then it appears that the stove was purchased for Straw, and Cunningham gave his parol promise to be bound with Straw for the pay. The rule, in such cases, is, that if the person for whose use the goods are furnished, is liable at all, any other promise, by a third person, to pay the debt must be in writing. *Elders* v. *Wakefield*, 7 Harris & Johns. 391; Rob. on Frauds, 208, 215; *Matson* v. *Wharon*, 2 Term R. 80; *Anderson* v. *Hayman*, 1 H. B. R. 120; 2 Stark. Ev. 595, n. 2; *Berkinge* v. *Darnell*, 1 Salk. 27; 2 Ld. Ray. 1085; 3 Salk. 15; *Leonard* v. *Vradenburgh*, 8 Johns. 29.

6. Cunningham was surety for Straw, and his undertaking was put into writing, and the recovery must be had on that, if at all, against him. *Miller* v. *Stewart et al.*, 9 Wheaton, 680; 5 Cond. R. 496. A surety cannot be made liable on the common counts. *Wells* v. *Gosling*, 8 Taunt. 737; 4 Com. Law. 264.

O. Seymour, for the plaintiff.

The note, in this case, being void, or ineffectual, through an omission, the plaintiffs may resort to proof of the original cause of action, and may recover on the general count in their declaration. *Brown* v. *Bebee*, 1 D. Chip. R. 227.

A plaintiff may, in all cases, when his declaration contains a count on a special agreement, coupled with a general count for goods sold, abandon his special count, after he has attempted to prove it, and failed, and resort to his general count. 2 Stark. Ev. 56; Buller's N. P. 139. *Felton* v. *Dickinson*, 10 Mass. R. 287; 5 Mass. R. 391.; 1 Chit. Pl. 269; 3 Bos. & Pul. 582; *Dutton* v. *Solomonson*, 4 East R. 75; *Masson* v. *Price*, 4 Ib. 147; *Thatcher* v. *Dinsmore*, 5 Mass. R. 299; 6 Mass. R. 358; 11 Mass. R. 359; 1 Pick. R. 57, 119, 415; 7 Johns. R. 132; 4 Bos. & Pul. 351. 1 Esp. R. 5, 6; 7 Vt. R. 223; 11 do. 516.

The opinion of the court was delivered by

BENNETT, J.—This is an action of assumpsit, upon a special promise, and the declaration also has a general count. The recovery was upon the general count. The case has been defended with zeal and ability, and all has been made out of the defence, which the case was susceptible of, but the court are not convinced that there was error in the proceedings of the county court.

The deposition of Brown states, in substance, that both the defendants applied to him to buy a stove for Straw's use, and that the witness, as the agent of the plaintiffs, sold them one upon their joint responsibility, at a given sum payable in cattle at a given day, and if not paid in cattle, to be paid in grain in a given period thereafter. It is insisted, in argument, that the general action cannot be sustained, inasmuch as there was a special contract for the stove, payable either in cattle or in grain. It is to be remarked that the time of credit had expired before the suit was brought; and in *Way* v. *Wakefield*, 7 Vt. R. 223, it was held that the general action would well lie for a harness, sold at a given price payable in boards, after there had been a breach of the contract. This case is, I think, according to the current of English authorities; and must be regarded as settling the law in this state.

In the present case, the price of the stove agreed upon was so many dollars, and not for a given quantity of grain. The debt had not been paid in the property at the time agreed upon, and it had become absolutely a cash demand. After this, there seems to be no reason why the general action will not lie, as well as it would if the debt had been originally payable in money.

It is also objected that the contract, so far as Cunningham is concerned, is within the statute of frauds. To bring a case within the statute of frauds, it is necessary that the undertaking should be collateral to, and in aid of, the promise of another. But in the present instance, the promise of the defendants is joint. They both made the purchase, and upon their joint responsibility.

It is, also, said that the general action will not lie against Cunningham, as he stands but a surety for Straw. If such was the relation of the parties, there would be weight in the

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objection. But such is not the case. To create this relation the sale should have been made to Straw alone. The fact that it might have been for the individual use of Straw, is not sufficient to create the relation of principal and surety.

It is said that the note, given by the defendants, upon the sale of the property, precludes the general action. The note, if it may be called such, is payable to J. & —— Wainwright, with cattle in one — from the 1st of October next, or *merchble* grain by the first of January following. The uncertainty, appearing upon the face of this note, is such as to render it void. We cannot, by intendment, supply the name of *Rufus*, nor the word *year* after the word one. We might as well intend it payable in one month, as one year. The case falls within the principle of the case of *Brown* v. *Bebee*, 1 D. Chip. R. 227, in which it was held that a note, by which the defendant promised to pay the plaintiff sixteen ——— by the first day of May, then next, was a nullity. In such case, parol evidence cannot be received to give effect to the intention of the parties.

Besides, it is a principle of the common law, that one simple contract is not a merger of another; and it is held in New York, and this is probably the English law, that a negotiable note, is not a merger of the original cause of action, so as to preclude a right of recovery thereon, if the note is brought into court to be surrendered up.

It might seem that the case of *Hutchins* v. *Olcutt*, 4 Vt. R. 549, somewhat extended the doctrine of merger, but I am not aware of a case in which we have extended it to a note not negotiable. In the case before us, there was no evidence of any agreement, that the note should be received in satisfaction of the stove. No such fact is found by the county court.

Brown was clearly a competent witness, and his deposition properly admitted. It is a well settled principal, founded ded upon public convenience and necessity, that a mere agent or servant is a witness for his principal. Greenl. Ev. 459. In this light the deponent stood to the plaintiffs.

The judgment of the county court is affirmed.

HARVEY YALE *v.* JONATHAN SEELY, JOHN SEELY, and JAMES KENWORTHY.

Standing trees may be the subject of a parol sale, so as to give the purchaser a right to go upon the land to cut them; and when cut, and left upon the land, they become the personal property of the purchaser.

Trees so cut, and left upon the land, do not pass with the land, in consequence of their having been attached to the soil, but remain, subject to the legal rights of the actual owner, like any other personal property; and any person purchasing the timber thus cut, and situated, has a legal right to enter upon the land to take it away; and should the owner of the land attempt to hinder him in the enjoyment of the right, he would be justified in using so much force as might be necessary to overcome the hinderance.

That the court expressed to the jury an opinion in relation to the weight of the testimony, is no ground for reversing the judgment, especially when the court directed the jury to find the fact from the evidence before them, and when the charge did not induce a wrong verdict.

THIS was an action of trespass, in four counts, for breaking and entering the plaintiff's close, on the 5th of February, 1840, and taking away a quantity of poles, and assaulting, beating and wounding the plaintiff. Plea not guilty, with notice of special matter.

On the trial in the county court, the plaintiff introduced evidence tending to prove that, in February, 1839, he purchased of one Russell Bly 40 acres, part of a lot of 114 acres of land, on which 40 acres, the poles in question, were lying, in a pile; that, by the contract of purchase, the poles, with the other timber, cut down on the land, were to go with it; that he paid one half the purchase money, and was, by said Bly, put into possession of the land, and continued in possession to the time of the alleged trespass, but had received no conveyance thereof, though he had, according to the contract, furnished security for the balance of the purchase money, and claimed a conveyance.

The plaintiff's testimony also tended to show that, at the time of the alleged trespass, the defendants, Jonathan Seely and John Seely, came to said close, with teams, for the purpose of drawing away said poles; that he forbid them to enter for that purpose, and claimed title to the poles, but offered to let them remain till the question of right could be decided; that, thereupon, the said John Seely, son and servant of the said Jonathan, drove his team upon the premises,

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when the plaintiff met the horses and struck them, whereupon the said John struck the plaintiff, and continued to beat him until forcibly restrained. It appeared that the said Jonathan did not interfere in any way to prevent the violence, but was engaged in pursuing and taking care of the horses; and that, thereupon, the said Jonathan and John took away the poles in question.

To connect the defendant, Kenworthy, with the trespass, the plaintiff offered evidence, tending to prove that, being present, in the employ of the plaintiff, he said, in the hearing of John Seely, when the plaintiff forbid his entering the premises, that he (Kenworthy) would not be stopped by the plaintiff, from taking the poles; and that, after the affray he went away with the Seelys. No evidence was given tending to prove that he was standing by, at the time of the affray.

The defendants introduced evidence, tending to prove, that, previous to the sale of the land in question, by Bly to the plaintiff, Bly sold all the pine timber, fit for sawing, on said 114 acre lot, including the land in question, to one Lathrop Birge, with the right of taking the same off, during the term of three years, which term was unexpired at the time of the injuries complained of; that it was customary, under such a contract for the sale of timber, for the person getting the timber for rafting, to cut boom poles from the land, and that Birge and Bly so understood the contract; that Bly advised Birge to cut the boom poles to raft logs, and that, previous to the sale of the land to the plaintiff, Birge cut pine timber on said lot, and, also, cut the poles in question, principally from a part of the 114 acre lot other than the 40 acres claimed by the plaintiff, and drew, and piled them where they lay when taken by Jonathan Seely.

The defendants further gave evidence tending to prove that, at the time of the alleged trespass, Birge had not taken all the pine timber he was entitled to take, from the 114 acre lot; that, at the time the plaintiff bargained for the 40 acres he was informed by Bly, and that it was a part of the contract between them, that the plaintiff was to have the 40 acres, subject to the right previously conveyed to Birge, and that the poles in question, belonged to Birge, and that Bly did not sell, or pretend to sell, the poles to the plaintiff.

The defendants' testimony further tended to prove, that,

Birge, having concluded not to raft his logs, had sold the poles in question to Jonathan Seely; that the said Jonathan and the said John Seely, his son and servant attempted, for the purpose of drawing off said poles, to enter said close, with teams, by a way which had been used for twenty years, for teams, &c., in the winter, when they were obstructed by the fencing up of the said way, by the plaintiff, whereupon, they entered the close at another place, where they were met by the plaintiff, who struck the horses upon their heads by which they were turned aside, and, thereupon, the said John struck the plaintiff with his whip, upon which, an encounter followed, in which, the plaintiff received injury—which were the breaking of the close, and the beating and wounding complained of—and that the said Jonathan was pursuing the horses during the encounter, and took no part therein.

The plaintiff requested the court to charge the jury that, if they found that the plaintiff purchased said 40 acres of Bly, in February, 1839, and paid a part of the purchase money, and entered into exclusive possession, and continued it up to the time of the alleged trespass, he could not be disturbed in that possession, until some one appeared with a superior title; and that any parol license or right which Birge might have obtained of Bly, could not be set up, against a *bona fide* purchaser of the fee, who fortified his equitable title, obtained by payment of a part of the purchase money, by taking peaceable possession, and continuing it under a claim of title founded on such purchase; and that, said poles being on the land where they were cut, and Birge not being, at the time of the purchase by Yale, in possession of any portion of the premises, the poles would pass to Yale, if it was so intended between Bly and Yale.

The plaintiff, also, requested the court to charge the jury that, if the poles in question were cut under a license to cut such poles as might be needful for booming said logs, Birge would not be entitled to them unless needed for that purpose.

The plaintiff, also, requested the court to charge the jury that, whatever might be the right of property in the poles, the defendants could not justify entering, with force and strong hand against the will of the plaintiff, and taking them away;

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and that the beating of the plaintiff was wholly unjustifiable, and that the plaintiff was entitled to exemplary damages.

But the court charged the jury, in substance, that if they found that a contract was made between Bly and Birge in the winter of 1838, though it was by parol, whereby Bly sold to Birge the pine timber, suitable for sawing, then standing on the 114 acres, and allowed him three years to get it off, and that Birge had entered upon the execution of the contract, on his part, and proceeded to cut the pine timber thus standing, and the poles in question—not only the pine timber, when cut, but also the poles, would become the personal property of Birge, although they should find that it was the understanding of Bly and Birge, at the time of making the contract, that they should be cut for boomage poles, as was testified to be the course or custom of such business, by said Bly; or, in case it was not so understood, at the time said contract was made, if they should find the poles were cut by Birge, by the subsequent assent and advice of Bly, and before his contract with Yale, for the purpose of being used for boom poles, that, then, Birge would not be divested of his ownership in the poles, though, from any cause, he should conclude not to use them for boom poles; and, that Birge would have the right of ingress and regress upon said premises, for the term of three years, in pursuance of such contract, to get off his property; and that, it being admitted that said poles were sold by Birge to Jonathan Seely, he would have the same right of entry, to take them off, that Birge, himself, had.

The jury were further told that a contract for the sale of the land, by Bly to Yale, in February, 1839, would not, of itself, include the poles which Birge might have cut and piled upon the premises; and that, if they found the property of the poles in Birge, under the instructions which the court had given them, it would follow that Bly had no property in the poles, at the time of the contract with Yale, and could transfer no right therein, to Yale, though the jury should find they were included in the contract with Yale.

The jury were further told, that if Birge was the owner of the poles, he would, under his contract with Bly, have the same right to enter the land as against Bly, to take them off within the time stipulated, as he would to take the pine tim-

ber, and that there was no testimony in the case, to prevent Birge from having the same right as against Yale; and that, if Jonathan Seely was the vendee or assignee of Birge, of the poles, he would stand in his place and succeed to his rights; and that if Seely had the right, and was attempting peaceably to enter the premises to draw off the poles, and was obstructed in so entering, he did not render himself guilty of breaking the plaintiff's close, by using so much force as was necessary to remove the obstruction, to enable him to enter for that purpose, and did enter for that purpose.

The jury were also told that, if Birge cut the poles in question, upon the land of Bly, without authority from him, the property of the poles, when cut, would not vest in Birge, but would be in Bly; and that, in that case, he could dispose of them to Yale, so as to give him the right of property.

The jury were further told that, if Jonathan Seely should be found to have the right to enter, and that John Seely, as his servant, in entering upon the premises, to draw off his poles, was forcibly resisted by Yale, and his horses assaulted and beaten, the said John Seely would be justified in using so much force as would be necessary to remove the obstruction, and protect his horses from violence, and no more; and that, if he went beyond that, he would become the aggressor, and would be guilty under the fourth count in the declaration —though courts and juries could not be precise, in such cases, in marking the precise boundaries or limits of such force, but there must be no wanton use of violence.

The jury were told, also, that in the opinion of the court, there was no sufficient evidence against Kenworthy to charge him on any of the counts in the declaration, nor against Jonathan Seely, to charge him on the fourth count, but that the jury would weigh the evidence, and determine for themselves; and that if Kenworthy or Jonathan Seely was present, aiding, assisting, or encouraging John Seely in the commission of any trespass, they would be equally guilty as the said John.

The jury were also told that, if Jonathan Seely had not the right of entry on said premises, and did not own the poles, he, and the said John, would be guilty, on the three first counts, for entering and taking them away.

The jury returned a verdict of guilty, as against John

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Seely, and not guilty, as against Jonathan Seely and Kenworthy.

To the charge of the court, and their omission to charge as requested, the plaintiff excepted.

Linsley & Barber, for plaintiff.

I. The contract between Bly and Birge for the sale of the pine timber on the 114 acre lot, with the right to enter upon the land for the space of three years to take it off, was a contract for the sale of an interest in land, and within the statute of frauds. 6 East. 602; 6 N. H. 430; 1 Y. & J. 396; Chit. Con. 241. If it was a contract of that nature, and was not executed according to the requirements of the statute, it is to be treated as a mere license, and though partly executed, was so far countermandable by Bly that Birge would be a trespasser for entering upon the lands, after the revocation of the license. The putting of Yale into exclusive possession by Bly under the contract of purchase, was equivalent to a revocation of the license so far as that parcel of land was concerned. Yale's possession was sufficient to enable him to maintain trespass; and the license to Birge, afforded no justification for an entry upon the land against Yale's will; and, of course, none to any one claiming under him. Chit. Con. 241; 2 Sug. Ven. 75–6; *Benedict* v. *Benedict*, 5 Day 469; *Cook* v. *Stearns*, 11 Mass. 533. The license was personal in its nature, and not assignable. 3 Kent's Com. 451.

II. The right of Birge to enter upon the 114 acres, was for a particular purpose, and although three years were allowed for its accomplishment, still, if it had been accomplished in six months the right of entry would be gone. So if it had been accomplished as to any particular portion of the 114 acre lot, the right to enter upon that portion would be gone—the owner having the right to follow the cutting of the timber by cultivation. Nor, would Birge or any one under him, have a right, under the contract, to use such portion for piling timber or poles, unless such piling was necessary in the accomplishment of the main object of the contract.

III. Birge had *no right* to cut and take these poles except for boom poles; and when he abandoned the use of

them for that purpose, all right to enter and take them *under the contract* was gone. Or if he acquired a property in them, by cutting them under an authority from Bly, given subsequent to the contract, he would have no right to enter to take them off, under the contract. But the court, on this point, in effect, charged the jury, that Birge might have acquired a right of property in the poles, either by the original contract, or by cutting them under a subsequent authority from Bly; and that, in either case, he would have a right, in pursuance of such contract, to enter for the term of three years, to take them off.

IV. The court erred in instructing the jury that Birge became the owner of the poles in question, by cutting them under an authority from Bly to cut them for a particular purpose, though he abandoned the use of them for that purpose. A person acting under a bare authority or license, must pursue, strictly, the authority, or he acquires no right or interest.

V. But, admitting that Seely was the owner of the poles, he had no right to enter upon Yale's possession by force and against his will to take them off. The general rule of law is, that a man cannot recapture his personal property where such recapture must occasion violence or endanger the peace of society. 3 Bl. Com. 4; 1 Swift's Dig. 464; 8 Term R. 78. A man cannot justify the breaking open a building or entering upon the grounds of another to reclaim his property, but must resort to an action, except in certain cases; as, if his property be stolen he may enter the land of another to retake it, 2 Roll. R. 55, 56, 208; or, if one man take the goods of another, and put them on his own land, the owner may enter and take them; or, if a stranger takes the property of another and places it upon the land of a third person by his assent, the owner may enter and take it off. *Chapman* v. *Thumblethorp*, Cro. Eliz. 329. But even in these cases, the law only justifies a peaceable entry. On the other hand, if goods are put on the land of another by the owner; or if, having goods in the house of another, he enter and take them, without license, he is guilty of a trespass, even though the entry be peaceable. *Taylor* v. *Fisher*, Cro. Eliz. 246; *Heermance* v. *Verney*, 6 Johns. R. 5; *Blake* v. *Jerome*, 14 Johns. R.

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406. A tenant for years, after his term has expired, cannot enter to remove his goods from the premises.

It would seem that one having a right to the possession of land cannot justify a forcible expulsion of one having actual possession, unless it be a naked possession merely, as that of a tenant at sufferance. *Hyatt* v. *Wood*, 4 Johns. 150; 3 Johns. 239; 3 Bl. Com. 147–8, Chit. Ed.; *Taylor* v. *Cole*, 3 T. R. 292. In the case of *Hyatt* v. *Wood*, Spencer, Justice, says: "In an action for the personal injury, 'the defendant who is not in possession, cannot justify an 'entry and the exercise of personal violence; but in an 'action for an injury done to the land, he may justify the 'force as it respects the possession."

The defendants, in the present case, had neither a naked possession of the premises, nor a title to them, nor a right to the possession. Their only claim was, to enter upon the admitted lawful possession of another for a specific purpose. The plaintiff, on the other hand, according to the principles of these cases, can justify the use of force in defence of his possession. 2 Bl. Com. 92, Chit. Ed. The case of *Richardson* v. *Anthony*, 12 Vt. R. 273, does not conflict with the principle contended for by the plaintiff. The entry of the defendant, in that case, upon the land of the plaintiff, to get his property, was peaceable. Besides, the court go, expressly, upon the ground that his right of peaceable entry existed because his property was in plaintiff's possession, *by plaintiff's own wrong*.

The doctrine we are combatting, confounds all distinction between a right to *defend* a lawful possession by force, and the right to *assert*, by force, a disputed claim. It will justify a man in committing the very trespasses upon another, for the committing of which, the statute will punish him by fine, and give the party injured a right of action, and treble damages. R. S. chap. 41, § 1–11; *Bliss* v. *Bange*, 6 Conn. R. 78.

VI. The charge of the court was wrong, relative to the rule which should govern the jury, in determining whether the battery was excessive, in saying that "courts and juries cannot be precise, in such cases, in marking the precise limits of such force." 3 Bl. Com. 2, 3. Chit. Ed. n. 2. The charge was also wrong, in relation to the liability of Jona-

than Seely and Kenworthy. 6 Bac. Abr. 590; *Mason* v. *Silver*, 1 Aik. R.367.

E. N. Briggs, for defendants.

1. The timber and poles were cut under a contract with Bly, and became the personal property of Birge.

2. A contract for the sale of the land, or even the absolute sale of it, by Bly to Yale, would not, of itself, include the poles. If the property of them was in Birge, Bly could not give Yale any title to them, even if he had so contracted.

3. If Birge cut the poles, for booming the logs, under the license of Bly, he did not lose his property in them by not using them for that purpose. They became his property when they were cut.

4. Birge had the right of ingress and regress, according to the terms of the contract, for the purpose of taking off his property. The statute of frauds does not declare all contracts by parol to be absolutely void, but only precludes the right to bring actions to enforce them. An act done under a parol contract, even concerning the sale of lands, is valid; but an executory contract is subject to be defeated. *Downey* v. *Hotchkiss*, 2 Conn. R. 225. It has been held that the sale of standing timber was not within the statute. 1 Lord Raym. 189; *Parker* v. *Stansland*, 11 East R. 362. A parol contract, executed, will protect the parties in their rights under the contract, and equity will even enforce a sale when there has been part execution of the contract. *Crocker* v. *Higgins & wife*, 7 Conn. R. 342.

Yale had no title to the premises. He only entered by a parol license from Bly, and had not such a title that, if Birge was tenant at *will*, he could have determined his license. Birge had a right, by his contract, to enter upon the land; and, having acquired the property, lawfully, *upon* the land, had a right to enter to take it off. *Richardson* v. *Anthony*, 12 Vt. R. 273; *Wells and al.* v. *Banister*, 4 Mass. R. 510; *Doty* v. *Gorham*, 5 Pick. R. 487; *Ellis* v. *Paige*, 1 do. 47; *Whiting* v. *Holmes*, 15 Mass. R. 153; *Hyatt* v. *Wood*, 4 Johns. R. 150. It was admitted that Seely acquired all the rights belonging to Birge.

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The opinion of the court was delivered by

Hebard, J. — This case comes before this court upon a bill of exceptions, upon which two questions arise. The first is, did Jonathan Seely own the poles, at the time he entered upon plaintiff's land to take them away? The other is, if he did own them, had he a legal right to go upon the plaintiff's land for the purpose of removing them, without the plaintiff's permission?

The first is a mixed question of law and fact, and, under proper direction from the court, must be settled by the jury. The court instructed the jury, "that if they found that a 'contract was made between the said Bly and the said Birge, 'in the winter of 1838, though it was by parol, whereby Bly 'sold to Birge the pine timber, suitable for sawing, then 'standing on the 114 acres, and allowed him three years to 'get it off; and that Birge had entered upon the execution 'of the contract on his part, and proceeded to cut the pine 'timber thus standing, and the poles in question, — not only 'the pine timber when cut, but the poles, also, would become 'the personal property of Birge, although they should find 'that it was the understanding of Bly and Birge, at the time 'of making the contract, that they should be cut for boom-'age poles, as was testified to be the course or custom of 'such business, by said Bly; — or, in case it was not so un-'derstood at the time said contract was made, if they found 'they were cut by the subsequent assent and advice of Bly, 'and before his contract with Yale, by said Birge, for the 'purpose of being used for boom poles, that then Birge 'would not be divested of his ownership in such poles, 'though from any cause he should conclude not to use them 'for boom poles; and that Birge would have the right of 'ingress and regress, upon said premises, for the term of 'three years, in pursuance of such contract, to get off his 'property; — and that, it being admitted, on trial, that said 'poles were sold by Birge to Jonathan Seely, he would have 'the same right of entry, to take off the poles, as Birge him-'self had." The inquiry upon this point is directed to the charge of the court; and if the charge was correct, the finding of the jury settles this part of the case. When Birge had cut these poles, pursuant to an understanding of Bly that he should and might cut them, he had acquired an in-

terest in them of which he could not be divested, unless by his own consent, or through some negligence on his part. The license to cut these poles, if gratuitous, might be revoked at any time before they were cut, but not after. New rights have been established by the act of cutting. The property itself has changed in character, and changed its ownership. The fact that Birge was permitted to cut them for *boom poles* has nothing to do with the ownership of them, so long as Bly had no interest in, and was, in no way, affected by the use to which they were to be put. Birge had permission to cut them for his own exclusive use and benefit; and whether, after cutting them, their use and destination were changed, was a question in which Bly was not interested, and had no concern, and was a fact upon which the ownership of the property could not depend.

It is further contended in argument that standing trees are a part of the soil; and that, although these poles were not standing trees at the time, still, being upon the land of the original owner, they are to be treated as if they had not been cut, and had passed with the land to the plaintiff. The unsoundness of this argument will be apparent, when we examine to see what it is that constitutes an article of property, personal in its character, when, under other circumstances, it savors of the realty. The *character* of property that is not *actually* attached to the soil, depends upon the situation in which it is, and the use to which it is put. The same material, if used for one purpose, becomes a part of the realty; but if used for another purpose, it is personal estate. These poles, lying in a pile, are no more a part of the soil upon which they rest, and are no more attached to it by any use to which they were designed, than boards lying in a mill yard. They, both, were once attached to the soil; but, having been severed and removed, the character of the property is changed. Buildings are, ordinarily, attached to the soil upon which they are erected, permanent in their location, and their use and the land upon which they stand is identical; and they are, therefore, regarded as real estate; but the materials of which they are composed, before being incorporated into the building, were personal property. And the same may be said of fences. But the cases referred to in Massachusetts and N. York seem to suppose that even

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buildings may be erected under such circumstances as to partake of the character of personal property.

These poles, being personal property, would no more pass with the land than any other article of personal property that should happen to be upon it. And, being the property of Birge, he could sell them, and convey as good a title as he himself had. And the case finds that Birge did sell them to Jonathan Seely, one of the defendants.

This, then, brings us to the consideration of the other question: namely, had Jonathan Seely a right to enter upon the plaintiff's premises to take away these poles? We have already seen that Birge was the lawful owner of the poles, and sold them to the defendant, Jonathan Seely; so that, whatever right Birge had to take them away passed to Seely, who, in that respect, stood in the same relation to plaintiff that Birge did to Bly. In relation to this right, I am aware that there is some apparent conflict of authority; but it is believed that it is more *apparent* than *real.*

It is laid down in Swift's Digest that "a man may enter 'upon the land of another to take away his tree that has 'fallen upon his land." "He may go upon the land of an- 'other to cut, and carry away, trees which he has bought, or 'corn to which he has a right; for, whenever the law grants 'a right, it grants whatever is necessary for the enjoyment 'of it." If the law gives the right to a man to do a certain act, it would be a solecism to say that in doing that act he would be a trespasser. But it is said that the plaintiff forbid the defendants' going upon his land. But if the defendants had a right to go upon plaintiff's land, what right had the plaintiff to hinder or forbid them? These are rights which are opposed to each other, and both cannot exist at the same time. But it is insisted that the party claiming this right is entitled to the enjoyment of it only when it can be done in a "peaceable manner." This is a qualification that is sometimes affixed to the right of *recapture* and *reprisal*, and applies to the regaining of personal property that has been wrongfully taken or withheld; and the law recognizes the right only with that qualification. But it is not so with regard to a *right* to enter upon another's land. If it is my right, the law will protect me in the enjoyment of it, —and the person who attempts to hinder or obstruct me is the

aggressor, and the first in the wrong. A right to enter upon the land of another for a particular purpose, in many respects is like a right of way across another's land, or the right to enter upon the land of another to remove a nuisance that he has placed there. It was settled, a long time since, that if A. sell to B. land that is surrounded by the land of A., B. has a right to pass over the land of A. This is a right incident to the sale, for the enjoyment of the thing purchased. It is a maxim of the law that if one man grants to another any thing, he impliedly grants every thing necessary for the enjoyment of it.

We think all these principles apply to this case. When Bly sold the timber to Birge, and permitted him to cut the poles, he at the same time gave him authority and license to take them away. When Birge, by such permission, had cut the poles, they became his personal property, and he acquired a perfect right to enter upon the land and take them away. This right was not confined to the person of Birge; he might send his servant to take them, or he might sell them, and the right would pass, with the property, to the purchaser. Jonathan Seely, then, being the purchaser of this property, became invested with the right to take it away. The plaintiff, when he took possession of the land, took it subject to this right, which was both *prior* and *paramount* to the plaintiff's title to the land, and which the plaintiff could not revoke or impair. I apprehend this principle was recognized in the case of *Goodrich* v. *Hathaway*, 1 Vt. R. 485. In that case, the plaintiff was permitted to maintain his action of *quare clausum fregit* against the defendant for cutting and carrying away a pine tree standing upon the land of one Hawkins, which the plaintiff had bought; and the only interest Goodrich had in the land was the right to enter upon it, and take away this tree. It would be a strange kind of legal logic to say that he could maintain trespass against a third person for going upon that land, if he could not insist upon the right to go upon it himself. But this doctrine is not peculiar to this case. The same doctrine is laid down in 1 Swift's Dig. 512, and other elementary writers.

These poles being the property of Jonathan Seely, and he having the right, by himself and his servants, to enter upon the

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land where they were, to take them away, he and his servants might as well protect themselves in the enjoyment of that right as any other. And, if the defendant could only enter upon the enjoyment of the right in a peaceable manner, as the expression is sometimes used, and understood, it would cease to be a right, whenever the plaintiff chose to dissent from it. It is difficult to see how a *right* in one man can be taken away, legally, by the wrong act of another. When the plaintiff attempted to hinder the defendants from going upon his land to take away the property, he became the first *tort-feasor*, and committed the first assault upon the defendants, by stopping and striking the horses.

The case of *Richardson* v. *Anthony*, 12 Vt. R. 273, is very properly relied upon as authority. That is a case, in which the defendant was sued for going upon the plaintiff's land, to reclaim his property,—and the Chief Judge, in delivering the opinion of the court, recognizes the doctrine laid down in Hammond's Nisi Prius, 153, "that the owner of goods and chattels has authority, by law, to enter the land of another, upon which they are placed, and remove them, provided they are there without his default." The authorities seem to make something out of the manner in which the property comes to be upon the premises of another,—and, perhaps, very justly—but the current of the authorities, recognize the right of the owner of personal chattels, to go upon the land of another to obtain them, when they are there by permission of the owner of the land. In the case of *Chapman* v. *Thumblethorp*, Cro. Eliz. 329, the court held "that when the defendant's beasts are taken from him by wrong, and are not out of his possession by his own consent, he may justify the taking of them, wherever he can find them."

In *Taylor* v. *Waters*, 2 C. L. R. 140; and *Wood* v. *Manley*, 39 C. L. R. 19, the same principles are recognized which govern this case. The notion that has obtained in connexion with the subject, was, probably, derived from the old English statute, against *forcible entry and detainer*, from which most of the modern statutes, on that subject, have been taken; and it is believed that no *civil action* has been sustained, even under those statutes, where the person, making the *forcible entry*, had the right to the possession.

Indictments have been sustained for the breach of the peace, —but, before those statutes, at common law, indictments would not lie. The case of *Hyatt* v. *Wood*, 4 Johns. 150, is a very strong case in illustration of that principle. In that case the owner of the land, was justified in taking forcible possession of the premises, against a man who was peaceably in possession. In the present case, the defendants seek to be justified in attempting to do that in a peaceble manner, which they had a legal right to do, and which they would have done peaceably, if the plaintiff had not committed the first trespass, and the first breach of the peace. The case of *Cook* v. *Stearns*, 11 Mass. 533, was determined upon a demurrer to defendant's plea, and the court sustained the demurrer, on the ground that the defendant did not set up such a right, as would authorize such an act. The court made a distinction between a license unlimited, and indefinite, and one to do a particular act, and limited as to time. And they said, "the distinction is obvious, that licenses to 'do a particular act, do not in any degree trench upon the 'policy of the law, that requires bargains respecting the title 'and interest in lands to be in writing. They amount to an 'excuse for an act, that, otherwise, would be a trespass; but 'a permanent right to enter upon the land of another, for a 'particular purpose, ought to be in writing." "A license to 'do a particular act is revocable, when executory, unless a 'definite time is fixed, but irrevocable when executed." We think the principle relied on by the defendants, is fully sustained by this case.

Benedict v. *Benedict*, 5 Day. 464, was an action of disseisin, and the principles discussed are not very analogous to the case; and the same may be said of the case, *Heermance* v. *Vernoy*, 6 Johns, 5. The *right* of entering upon the land of another was very little discussed. No justification was pleaded, and the case finally turned upon the rejection of testimony.

In the case of *Blake* v. *Jenner*, 14 Johns. 406, the case turned upon another point,—although the court intimated that the act complained of, would be a trespass; but the main point was very little gone into.

This disposes of the two principal points in the case; and, according to the view we have taken of it, all the plaintiff

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was entitled to recover, was for the excess of the beating; and this, under the direction of the court, the jury have found for him, against John Seely, one of the defendants.

The plaintiff complains of the charge of the court, in relation to Jonathan Seely and Kenworthy; but it is of little importance, further than it affects the cost, whether the judgment is against all the defendants, or only against one, so long as he has recovered a judgment against the one, from whom he received all the actual injury. The principal ground of complaint is, that the court ventured an expression of opinion in relation to the proof; but this cannot be a sufficient reason for granting a new trial, so long as the court directed the jury to find the fact, whether Jonathan Seely and Kenworthy were aiding and abetting the trespass. The jury were directed to find the fact, from the evidence in the case, and being so directed, we are not to presume, that they disregarded their oaths, to follow what they imagined to be the opinion of the court, when that opinion conflicted with their own judgment of the weight of evidence.

The plaintiff also objects to the charge of the court in relation to the excess of force, that the jury might find to have been used. The court told the jury, "that John Seely 'would be justified in using sufficient force to remove the 'obstructions, and protect his horses from violence, and 'no more,—and that if he went beyond that, he would be 'guilty under the 4th count." Under that charge, the jury found John Seely guilty, and assessed the damage, as it was their duty to do; and the *amount* was a matter resting entirely in their discretion. This direction of the court we regard as being unobjectionable, and was all that the plaintiff had a right to claim. But that part of which the plaintiff complains is the following:—The court told the jury that, "courts and juries cannot be precise in marking the precise limits or boundaries of such force." But for this we do not see any cause for granting a new trial, even if it was not correct, because it did not induce a wrong verdict; for, notwithstanding the charge, he obtained such a verdict as he sought. Upon the whole we are satisfied with the ruling and charge of the county court, upon all the points reserved, and with the result of the trial; and the judgment of that court is affirmed.

CUTTER & MONTAGUE *v.* HIRAM ADAMS.

In an action for a false and fraudulent representation, by reason whereof credit is given for goods sold, it is sufficient to allege the substance of the representation, without attempting a literal recital.

The same amount of evidence is not necessary, in such a case, as in a criminal prosecution.

A declaration, that defendant represented in substance, that a purchaser of goods, was a fit person to be trusted, and that goods might be safely sold to him on credit, is not supported by proof, that defendant said he was doing a fair business.

THIS was an action, on the case, for the false and fraudulent representations of defendant, to plaintiffs, on a sale of goods, by them, to one Hiram Ferris, in October, 1839, in relation to the circumstances of said Ferris. The declaration contained three counts on the false and fraudulent representations, to which was added a count in trover, for the same goods.

The first count alleged, that, defendant said "he knew the 'said Hiram Ferris, and had done business with him, and 'had sold out to him his stock in trade, and that said Ferris, 'was then doing a good, safe, and profitable business, at Ver-'gennes, Vermont, and was well worth about four thousand 'dollars, and that he was perfectly good, and responsible, for 'all goods he might wish to purchase."

The second count alleged, that the defendant "asserted 'and represented, to the plaintiffs, in substance, that they 'might safely trust, and give credit, to the said Hiram Ferris, 'in that behalf," &c.

Allegation in third count, same as in second, except, that the false representation was made to plaintiffs' agent.

Plea, general issue, and trial by jury.

The only direct evidence the plaintiffs offered, in relation to the false and fraudulent representations, was the testimony of Edward Smith, who testified, that, on the 22d day of October, 1839, he was a clerk in the plaintiffs' store, in the city of New York, and that, on that day, Ferris called at said store and selected some goods—some more on the 23d, and in the forenoon of the 24th, finished selecting, and laying out, the goods he wished to purchase—the whole amount being $1,587.32.

The witness further stated, that the mode in which Ferris

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selected and laid out the goods, excited the suspicions of the plaintiffs, and they directed the witness not to sell and deliver the goods to him, without more satisfactory information as to his solvency, and specially directed the witness to make inquiries of the defendant, to whom the witness had, on previous inquiry as to Ferris' situation, been referred. The witness further testified, that, at noon, on the 24th day of October, 1839, he met the defendant, at Howard's Hotel, in New York, told him that Ferris was desirous of making a purchase of goods of plaintiffs, of twelve hundred dollars or more, and inquired as to his responsibility and credit, and that the defendant replied, that he was worth four or five thousand dollars, was doing a good and safe business, that himself and brother had sold him out their stock of goods the spring before, amounting to about five thousand dollars, and that their debt for the goods, would not become due until after the goods Ferris was about purchasing of plaintiffs, would fall due, and would not interfere with his paying for them. The witness further testified, that, upon communicating this information to plaintiffs, they directed him to go on, and deliver the goods to Ferris, and that they were delivered solely on defendant's said representation.

The plaintiffs, also, offered evidence tending to prove that Ferris never was worth anything; that, though he pretended to purchase out the defendant and his brother's store of goods, in the spring of 1839, and do business through the the summer in his own name, yet, that he had paid nothing for the goods; that he had lost considerable sums during the summer of 1839, in the purchase of produce; that two or three days before the making of said representation, he had been sued in New York for a debt for goods, and that, defendant had, within two or three days previous, become responsible for him, in New York, for some four or five thousand dollars; that all these facts were well known to the defendant at the time of making such representation, and that no allusion, whatever, was made to them, by him, when he made the representation to Smith, nor had the plaintiffs any knowledge of them.

The plaintiffs also gave evidence tending to prove, that, within a few days after the goods arrived at Vergennes, Ferris transferred all his goods, notes, and accounts, to the

defendant—the defendant agreeing to pay some portion of Ferris' debts, but not the plaintiffs' ; that Ferris was utterly insolvent, and that no part of plaintiffs' debt had been paid, or could be collected of him.

Among the witnesses introduced by the defendant, was Ferris, who testified, among other things, that the goods were wholly purchased on the 22d and 23d of October, 1839 ; that before noon of the 24th of October he had left the plaintiffs' store for the last time, and that when he left, it was understood the plaintiffs were to forward the goods, and that part were boxed before he left the store. Smith in his testimony swore the goods were not boxed until after Adams made the representation.

The defendant, also, offered one Chapman, who testified that he was present and heard Smith inquire of Adams about Ferris ; and that Adams told Smith, his means were small, that he was doing a fair business ; and, on Smith's inquiry if Ferris had any means, or income, except from his trade as a merchant, Adams told him, that his wife and children would inherit, from her father's estate, five thousand dollars, and that Ferris would have the use of it ; and that the above was all the conversation which passed on the subject, at that time.

The defendant, also, offered L. B. Fillmore, who testified that Smith, a few weeks after the sale of the goods to Ferris, called on Adams, and that, at one time when he called, he asked Adams what he was going to do about those goods ; and that he, Adams, asked Smith if he had ever bought any goods of him, on his own account, or ever recommended any one to buy any of them—to which Smith answered, that he had not ; and Adams then asked Smith why he came to him, and Smith said, that, as he had the goods, he ought to pay for them. Plaintiffs offered evidence of Smith's general good character, and, also, that Ferris' wife, who was the sister of defendant, died in 1832, leaving children by Ferris.

The defendant's counsel requested the court to charge the jury, that, to entitle the plaintiffs to recover, they should have the same amount of testimony as would be necessary if Adams was prosecuted, criminally, for the offence ; and that, at all events, they could not recover, on any testimony less

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than that of one, unimpeached witness; and, as Smith's testimony was impeached, in this particular case, by Chapman's testimony, and evidence of general good character did not, and could not, restore him, so that his testimony would be entitled to the same effect it would have, if it was uncontradicted, with respect to this particular conversation, it was insufficient to entitle the party to recover.

The court were, also, requested to charge, that, if the sale of the goods was complete, so as to pass the property, though the goods still remained in the plaintiffs' store, the defendant would not be liable, as it could not be said that the goods were sold on his, the defendant's representation.

The court were, also, requested to charge the jury, that, it was necessary for the plaintiffs to prove the false allegations laid in the counts, which counted on a fraudulent representation; and if the representations were such as Chapman stated, they would not support the declaration.

The court, however, instructed the jury, that this was a civil action, and to be governed by the same rules of evidence as other civil actions, and they would return their verdict upon a fair balance of evidence; and that, as to the testimony of Smith, it was purely a question of credit, which belonged exclusively to the jury; and that, if they believed his testimony, they would give it effect accordingly; and that, in determining the credibility of this witness, they would carefully consider, on the one hand, how far he was impeached, and, on the other hand, how far he was sustained.

The court charged the jury, that, if the goods were delivered to Ferris, in consequence of the representation made by the defendant, the plaintiffs trusting therein, it was all that the law required in this particular. And as to the fraudulent allegations in the plaintiffs' declaration, the jury were told that it was incumbent upon the plaintiffs to prove them substantially as alleged. The jury returned a verdict for the plaintiffs, and the defendant excepted.

Tucker, Linsley & Woodbridge, for defendant.

I. In an action for a fraudulent recommendation, the words which are claimed to have been used to perpetrate the fraud, are matter of substance, and the same principles should apply as in slander. In both cases the words must

be false, and must be used, *malo animo*, and damages must result. The falsehood of the words lying at the foundation of each action, every reason requiring particularity and precision in the allegations in the one case, apply, with equal force, in the other. The strictness required in slander rests on the ground that the action, being for words, the words used are the foundation and gravamen of the complaint. And the leading cases seem to proceed on the ground that the declaration must be proved as laid. See *Paisley* v. *Freeman*, 3 Term R. 51; *Haycraft* v. *Creasy*, 2 East. 107; *Topp* v. *Lee*, 3 Bos. & Pul. 367; *Eyre* v. *Dunsford*, 1 East. 318. The testimony in this case does not support the declaration, as is sufficiently apparent on a comparison of the proof, stated in the record, with the allegations in the several counts. The plaintiffs are not aided by saying that defendant, in substance, represented, &c.; for if this form of declaring could be tolerated in this action, yet the true and real sense and spirit of the expressions must be given. In slander, this form of declaring is rejected as loose and unsatisfactory, and no good reason appears why the same rule should not prevail here.

II. The charge is erroneous, in not instructing the jury what was necessary to be proved, and what words would, and would not, support the declaration. In an action for slander, if there is a question of variance raised, it is the rule of the court, to instruct the jury with regard to the particular proof offered, pointing out what will, and what will not, support the declaration; and even in assumpsit, on a question of variance, the court must decide what is a variance. *Durkee* v. *Mahoney*, 1 Aik. 116; *Mott* v. *McNiel*, 1 Aik. 162.

III. If Chapman's account of the words used, was true, no point of the declaration was proved; and hence the defendant was entitled to explicit instructions on that point. Instead of this, the jury were left with the single direction, that plaintiff must prove the fraud substantially, as alleged.

The counsel for the defendant further cited the cases of *Briggs* v. *Georgia*, 12 Vt. R. 60; *Lindsay* v. *Lindsay*, 11 Vt. R. 626; *Mason* v. *Silver*, 1 Aik. R. 367, *Fletcher* v. *Howard*, 2 Aik. 115; *Smith* v. *Carrington*, 4 Cranch, 62; *Brainard et al.* v. *Burton*, 5 Vt. 97.

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J. Maeck argued for plaintiff.

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The opinion of the court was delivered by

ROYCE, J.—It is contended that the plaintiffs were not entitled to recover, admitting the representation to have been made precisely as the witness, Smith, stated it. And the objection is, that, in this kind of action, the representations proved should correspond as literally and fully with those alleged in the declaration, as is required in an action for slanderous words.

If there is any such analogy as the objection supposes, it is only because the plaintiffs' injury, in both cases, results from declarations wrongfully made by the defendant. Intrinsically the two actions have little or no resemblance. In slander the ground of action is the injury resulting from impaired reputation; whereas, in actions of the present class, pecuniary injuries only, are to be redressed. The injury in one case is effected by a groundless and malicious attack upon the plaintiff's character; in the other by deceit, operating to mislead him to his prejudice. In the one case the damage sustained is not supposed to result from any agency of the plaintiff himself; in the other, his own misguided act has occasioned it. It may be added that, according to the forms of declaring, furnished by Mr. Chitty and other approved authorities, it is allowed, in this sort of action, to allege the substance of the representation, without attempting a literal recital. This is a license not permitted in the action of slander. Stark. Sl. 266; *Newton* v. *Stubs*, 3 Mod. 71. But should the proposition contended for, be granted, it would not warrant the conclusion assumed. It is not required, in slander, that the identical expressions charged should be proved, and much less that they should all be proved; it is enough that words of the same import are proved, and that, to a sufficient extent, to show a legal cause of action. In this view, there can be no doubt that the testimony of Smith sufficiently tended to support the declaration.

The remaining questions arise upon the charge of the judge. We think his instructions, in reference to Smith's testimony, were unobjectionable. The testimony of Chapman and Fillmore tended to impeach the witness, and the evidence of his good character tended to support him. Under

such circumstances it became, as the judge remarked, a mere question of credit; and the jury were properly left at liberty to act upon the testimony of Smith, if they thought the impeaching testimony had been fully counteracted.

As the cause on trial was neither a criminal prosecution, nor an action of a criminal nature, the judge was, also, warranted in charging that the plaintiffs would be entitled to a verdict, if a fair balance of evidence should be found in their favor.

The defendant requested instructions to the jury, that if the representation was as Chapman had stated it, the plaintiffs were not entitled to recover. The charge was: "that if the goods were delivered to Ferris in consequence of the representation made by the defendant, the plaintiffs trusting therein, it was all that the law required in this particular; and as to the fraudulent allegations in the declaration, it was incumbent upon the plaintiffs to prove them substantially as alleged." In passing upon this part of the charge, it is to be borne in mind, that but a single representation had been made; and this must be taken to have been as Smith had stated it, or as Chapman had stated it. And though it may be more probable that the jury proceeded upon the former than the latter statement, it is not certain, upon the record, that they did so. The statement of Chapman is now claimed, in argument, as sufficient to support the action, and, for aught appearing in the case, it may have been so claimed at the trial; indeed, the defendant's request for a charge in reference to that statement, renders the fact probable. And since the judge did not distinguish between the two statements, the defendant has a right to insist, that the verdict for the plaintiffs may have been found upon Chapman's statement. This raises the question whether, under their present declaration, the plaintiffs were entitled to recover upon the representation as given by Chapman.

It is not, strictly, a question of variance, but rather a question as to the extent of proof. And unless the representation, as stated by Chapman, tended to prove the substance of some one count in the declaration, the judge committed an error in declining to charge, as requested. Now the only clause in the testimony of Chapman which seems to have tended, even in substance, to support any averment in

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the first count, was the defendant's declaration that Ferris was "doing a fair business." But this, being preceded by the remark that his means were small, did not satisfy Smith, who immediately inquired if he had other means aside from his business. It can scarcely be pretended that the defendant's reply (concerning the property in expectancy for the wife and children of Ferris) had a tendency to prove the alleged assertion that he was worth five thousand dollars.

I shall next inquire whether this testimony had a proper tendency to prove the second and third counts in the declaration. Here the allegation is, that the defendant asserted and represented, in substance, that Ferris was a fit person to be trusted, and the plaintiffs might safely sell him goods on credit. As no limitation is expressed, an indefinite, or general, credit is to be understood; such a credit as Ferris, in his business as a country merchant, might think it beneficial to ask, or, perhaps more properly, such credit as most merchants in the country are accustomed to receive. The question is, whether it should have been inferred, as the natural and obvious import of the defendant's conversation, as detailed by Chapman, that Ferris was a fit person to receive such a credit. And as a means of testing the correctness of such an inference, we may suppose the statement of Chapman to have been declared upon as he gave it, and the representation alleged in these counts to have been subjoined by way of *innuendo*. It would then be required, that the representation so declared upon should justify and support the *innuendo* which professed to allege its meaning. The case of *Gainsford* v. *Blackford*, 6 Price, 36, and 7 Price, 544, furnishes an illustration. The declaration set forth that the defendant, on being inquired of, as to the circumstances of a person asking credit of the plaintiff, said that he had been paid a debt due to himself from that person, and that he was ready to give him credit for any thing he wanted. It was held that this *colloquium* did not support an *innuendo* alleging the meaning to be, that such person was in good circumstances, and fit to be trusted, generally, with goods, on credit. In the case cited, the defendant was doubtless guilty of insincerity and fraud, because he knew that the person referred to had recently obtained his discharge under the insolvent laws. The case

is, therefore, not to be understood as deciding that the plaintiff was without remedy against the defendant, but only that he had assumed to construe the defendant's words in a sense beyond their appropriate meaning. We think the same should be said of the second and third counts of the present declaration in reference to the testimony of Chapman. That testimony does not, in our opinion, sustain the general and unqualified allegations of those counts. The result is, that the defendant was entitled to the charge requested. Were the averments in the declaration properly adapted to such a case as this testimony tends to make out, the rights of the parties would rest upon grounds not affected by the present decision.

Judgment reversed.

FREDERICK SMITH *v.* JAMES MILES; and FREDERICK SMITH and WIFE *v.* JAMES MILES.

In actions for slanderous words, the jury are to determine the sense in which the defendant spoke the words, and the truth of the innuendos alleged.

In cases where the words are equivocal, or are spoken with reference to circumstances supposed to be in the minds of the hearers, which go materially to qualify their import, the condition and circumstances of the subject-matter connected with the charge may be inquired into, and the sense in which the hearers understood the words, and in which they supposed the defendant intended them to be received, may be considered by the jury.

But the mere fact that the defendant charged the plaintiff with theft, in regard to an article of property which had been either loaned or sold to the plaintiff, but which sale or loan was not known to those, in whose presence he made the charge, will not be a ground of showing, either that the act charged was impossible, or that the charge was not seriously made; nor, is it competent to go in mitigation of damages, except as tending to show the words were spoken in heat and haste.

THESE were actions of slander,—the first in a declaration of four counts, charging the defendant with having spoken the words following.

"Smith and his wife have both stolen my property, and I can prove it."

"I have been down to get my lightning rods, before Smith steals them, for he has stole and will steal again."

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"You (Smith) have stole from me—you and your wife both."

"Smith and his wife, have stole, and I can prove it, if Horace Loomis will tell the truth."

The words charged in the second case, were substantially the same. Pleas, the general issue and trial by jury. The testimony offered, the testimony rejected, the request to charge, the charge, and the exceptions, were the same in both cases.

In the first case, the plaintiff gave evidence tending to prove the speaking of the words as set forth in the plaintiff's declaration. The defendant, without objection, gave evidence, tending to prove, that, before the speaking of the words complained of, one Loomis had deposited with the plaintiff a quantity of personal property, among which was a bed-tick, and that he had sold the same to Smith, with the exception of the bed-tick, which the defendant claimed that Loomis had given to him, but which the plaintiff claimed he had purchased of Loomis, with the other property.

It appeared, also, that, at one of the times of speaking the words alleged in the declaration, in the presence of divers persons, he, the defendant, was inquired of, after the speaking of the words, what he meant, and he replied that he alluded to the bed-tick as the property which the plaintiff had stolen; but there was no further, or other, explanation made by the defendant. At the other times of speaking the words charged, there was no explanation asked, and none given, though some of the witnesses had heard that the parties had had some difficulty about a bed-tick, and supposed the defendant might have intended to allude to that; but there was no evidence that they ever had learnt from him under what circumstances it went into the possession of the plaintiff.

The defendant requested the court to charge the jury that if they found the bed-tick had been put into the possession of Smith, with the other property, by Loomis the owner of it—that, admitting that Miles had bought it of Loomis, Smith's refusal to give it up to Miles, and his using it in his family, would not be theft—and, that, if the jury found that the words spoken had reference to the bed-tick, and were so understood by those in whose hearing they were spoken,

they should consider the words not actionable; or if actionable, that it should go in mitigation of damages.

The court declined so to charge the jury, but did, among other things, charge them that it was of no importance whether the defendant referred to the bed-tick as the property stolen, and was so understood at the time of the speaking of the words, or whether he referred to other property which might be stolen, inasmuch as there was no evidence tending to show that the defendant ever so explained the words spoken, as tended to prove that his meaning was only to charge the plaintiff with being guilty of those acts which would constitute a mere trespass, and not a theft; and that it would constitute no defence to the action, and was not admissible in mitigation of damages any further than it might tend to prove that there existed a quarrel between them, and that the words were spoken in the heat of passion, or under excitement; and that, in this point of view, the jury might take it into the account in mitigation of damages, and give it its proper effect.

The defendant offered in evidence the deposition of one German F. Warner, which was objected to by the plaintiff, and that part of it was rejected by the court, as being impertinent, in which the deponent stated that, about the time that Loomis moved from Ripton, the plaintiff, Smith, told the deponent that Loomis wanted to sell him, among other things, a bed-tick, and that he told Loomis he did not want it—that he understood Smith to say that Loomis, afterwards, gave it to Miles, and that Smith, afterwards, told the deponent that his, Smith's, wife had cut it up and used it.

The jury returned a verdict for the plaintiff.

To the charge, and omission to charge, and decision excluding part of the deposition, the defendant excepted.

O. Seymour, for defendant.

Words spoken of another, imputing the commission of a crime, are actionable only, on the ground that they expose the party accused to a criminal prosecution; therefore, words, in themselves imputing the commission of a crime, are not actionable, when spoken of a transaction, which could not amount to the crime charged. For this reason, that part of the deposition of Warner, excluded by the court,

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should have been admitted, as tending to show that the transaction in relation to which, the words charged in plaintiff's declaration, were spoken, was a simple tort, and could not amount to the crime of theft.

The court erred in refusing to charge the jury as by defendant requested, and in giving *such* charge as the case shows was given, because slander and damage consist in the apprehension of the hearers; and if the words charged in plaintiff's declaration were understood by those who heard them, to be spoken in relation to the "bed-tick transaction"—which was no theft, but *trover—then* they were not actionable; and it was of no consequence whether the hearers understood this from an explanation made at the time by the defendant, or otherwise. 2 Stark. Ev. 461; *Penfold* v. *Westcott*, 5 Bos. & Pul. 335; *Fleetwood* v. *Curley*, Hobart's R. 268; 1 Viner, 507; Sel. N. P. 1158; *Van Rensselaer* v. *Dole*, 1 Johns. Cas. 279.

C. Linsley, for the plaintiffs.

I. The charge was right, there being no explanation of the words at the time, and nothing tending to shew that the defendant designed to charge plaintiff only with a trespass. It can be no answer to an action of slander, to show that the speaker alluded to some particular transaction, unless from all the words it appears that he did not intend to make the charge, which the words naturally import.

II. The words import a felony as much if the speaker said he stole a bed-tick, as if he had not specified what he did steal. "A general slanderous imputation conveyed in apt terms," is said, by an able writer, to be a good definition of slander for which an action may be had. Whether words are slanderous or not, is a question of law. Hence if the court perceive that the words are so qualified by the context, or the subject-matter, that they do not import a felony, but a mere trespass, then, the words are not actionable. Stark. Sl. 80; *Dexter* v. *Taber*, 12 Johns. 241; Ld. Ray. 959.

III. The words, after verdict, are to be taken to have been used in a slanderous sense, if capable of such a meaning. Starkie on Slander, 81.

IV. The deposition was properly excluded, there being nothing in the part excluded that was legal evidence under the issue.

The opinion of the court was delivered by

REDFIELD, J.—It is obvious the jury must find the speaking of the words as alleged, i. e. so many of the same words as go to constitute the sting of the charge, and the truth of all the averments and innuendos necessary to support the action. In order to do this, they must determine whether the defendant, apparently, used the words in their common and obvious signification, or in some ironical, hyperbolical, allegorical or other figurative sense.

In this view, doubtless, the sense in which intelligent and observing witnesses, who were present, and noticed the publication, understood the words, is important to determine the extent of the defendant's liability; but it is not conclusive. The defendant is supposed to intend what his words import, and what others understand from them. But he may intend to convey a deeper meaning than is apparent at first blush; and he may intend less. This depends upon the attending circumstances, gestures, tones, and innuendos, which have a "most potent oratory" often, but which no man can describe or imitate. Hence, those who see and hear those incidents, are permitted to state the impression made upon their minds, at the time, on the same ground, I apprehend, that any witness is allowed to state appearances, in any case, where such appearances are, in their nature, incapable of exact and minute description; e. g. the health or sanity of a person, at a particular time, in regard to which even unprofessional witnesses are permitted to speak of opinions formed at the time from indications and appearances not susceptible of description.

But, after all, the true test is the same given by Dr. Paley, as a test of the interpretation of promises and contracts, namely, how did the person, speaking the words, expect others, to whom they were addressed, would understand them? —for by this expectation he must, and ought to be, bound. Now this is a question we can never determine, with absolute certainty, but must resort to such circumstances as are calculated to show what this expectation was.

It is, doubtless, further necessary that it be shown that the bystanders understood the words to convey a slanderous imputation, as malice and damages are both necessary to concur, in order to give a ground of action. So that the mere

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fact that the defendant intended to be understood in a slanderous sense is not, perhaps, sufficient.

I think it may be safely assumed that the person speaking will expect the hearers to take the words he speaks with reference to all the facts which he names at the time, and as many other facts or circumstances as he may reasonably expect are within their present knowledge. If the speaker has a hidden and secret meaning beyond that, which renders the words either more or less slanderous, and which he has no reason to expect will be communicated to the minds of his hearers by the words which he uses, that secret meaning is not to be taken into the account, either to increase or extenuate the guilt of the defendant.

Thus if the defendant makes a declaration which, in its terms, or with reference to facts which he supposes to be in the recollection of the hearers, is impossible, or, so to speak, *felo de se*, he expects it will beso received. Hence the numerous decisions in regard to slanderous words of that character—e. g. to say of the plaintiff, "he is a murderer, he 'killed my dog"; "he is a thief, he stole my farm or tree"; "he is a counterfeiter, and paints miniatures," &c.

And if the charge is impossible with reference to facts supposed to be in the minds of the hearers, it is the same as if they had been expressed. Hence, in his defence, the defendant is always permitted to show these facts, in order to show in what sense he is liable for using the words. This is the ground of the decision in the case of *Van Rensselaer* v. *Dole*, 1 John. Cas. 279. The words were charged to have been spoken, and were proved to have been spoken, with reference to the procession at Lansingburgh on the 4th of July, and what was notoriously within the knowledge of the hearers, at the time of the speaking; and the charge was manifestly and absurdly impossible, and even ridiculous, with reference to the known transaction, as understood and acknowledged, both by the defendant and all who heard him. In that case, a Mr. Bird claimed a bass viol of the celebrating party, of which the plaintiff was one, and they refused to give it up, and retained it by force, whereupon an affray ensued, and Bird received a dangerous wound. The words were, that all the party were "a set of black-hearted high-'waymen, robbers and murderers."

There is another class of cases, where the words are ambiguous in their import, like a charge of stealing corn, timber, &c., which, while growing upon the land, is not the subject of theft, but when secured, may be. And here the same rule is pursued in regard to slanderous words which is adopted in the construction of contracts; and the condition of the subject-matter, at the time of the alleged taking, if the charge be theft, is permitted to be shown, as the words are supposed to have been spoken, and understood, according to their natural import, with reference to the acknowledged or ascertainable condition of the subject-matter, at the time of the taking, or the speaking of the words. It is upon this ground the case of *Dexter* v. *Taber*, 12 Johns. R. 239, should have been decided, and that would have brought the court to the same result they reached by another road, which I should agree with Justice Spencer was one rather darkly defined by established principles, or former precedents. It is on this ground, if any, that the case of *Christie* v. *Corvell*, Peake's N. P. C. 4, must be justified. "He is a thief, he 'stole my beer." Mr. Selwin puts the case on the same ground with—"you are a thief, you stole my tree." Cro. Jac. 114; Bul. N. P. 5. That is the only ground of reconciling the case with principle; and, in that view, it is much like *our nisi prius* cases—not, always, very well considered, or very wisely determined, and sometimes, if sustained, it must be by giving them a construction they were never intended to bear.

But in the present case, nothing is more apparant than that there was nothing in the accompanying circumstances, proved or offered to be proved, tending to show, that the defendant could reasonably have expected the hearers to understand his words in a sense different from their natural import. In only one instance, did he allude to the transaction, out of which he alleged the theft arose, and then, in no manner calculated to induce any doubt, whether the plaintiffs were, in fact, guilty of theft. It is quite as easy to steal a "bed-tick," as any other thing. The terms he used were not of doubtful import. The condition of the property was not such that theft could not be committed upon it. He neither had any right to expect that those who heard him, knew, nor did they, in fact, know, any such matters in relation to his

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charge, as would induce them to consider that the defendant did not intend to charge the plaintiffs with literal theft.

In regard to the testimony, as tending to mitigate the damages, it was competent, in that view, if it had any such tendency, beyond that which was given to it; but the court think it had not. There was nothing tending to show that the defendant could, at any time, have supposed the plaintiffs intended, secretly and feloniously, to appropriate the bed-tick.

Judgment affirmed.

DAVID A. CRANE *v.* MIRIAM STICKLES, principal debtor, and LUTHER FERRE and JOSEPH K. FERRE, trustees.

The payee of a note, after having taken security of the principal, may give up such security, and call upon the undersigner of the note, provided he acts in good faith, and only with reference to his own interest.

The payee of a note is not obliged to regard the directions of the surety.

A creditor may maintain a trustee process against the vendee of property, fraudulently purchased to keep it from being attached, and is not obliged to try the validity of the sale by attaching the property.

Where one disposes of all his property to secure a future support through life, making no provision for the payment of his debts, the sale, as to his creditors, is fraudulent and void.

ASSUMPSIT against the principal debtor, on a joint and several note for $65, dated January 5, 1840, and payable January 1, 1841, signed by the said principal debtor, and one Marcus C. Woodworth.

The action was commenced at the June term, 1841, of Addison county court, when the trustees appeared and severally disclosed that they had not any goods chattels, rights or credits, of the said Miriam Stickles, in their hands or possession; that the said Miriam was sister to the said Luther Ferre, and aunt of said Joseph K. Ferre; that she was an aged woman, in feeble health and unable to labor for her support; that about the middle of July, 1840, she came to live with the said Luther and Joseph K., and from that time had been supported by them; that having a life estate, in about sixty acres of land, she conveyed the same to them on the 24th of December, 1840, together with twenty-four sheep, three cows, two two year olds, three calves, and two stacks of hay,

in consideration of their supporting her, during her natural life—to which they bound themselves by writing, on the same day; that the said land was not in good condition, and the use of it was worth about $50 a year; and that there was but about half enough of the hay to winter through the said cattle and sheep.

There was no evidence except the disclosures of the trustees.

The court decided that the trustees had effects, and were liable as trustees, to the amount of the note and interest, to which decision they excepted.

In the action against the principal debtor, she plead the general issue, which was joined to the court. On the trial she gave evidence tending to show that the note in question was given for a waggon, purchased by said Woodworth of the plaintiff, and was signed by her as surety for Woodworth, which relation of surety was well known to the plaintiff; that about the time the note became due, Woodworth executed to the plaintiff a bill of sale of twelve acres of wheat and rye, as security for the payment of the note; that when said grain had ripened and was fit for harvesting, the plaintiff claimed to have a lien thereon, by virtue of said bill of sale; that Woodworth employed a man to cut the grain for him, and to keep it in his custody, until some arrangement should be made about it, who thereupon, cut, and took possession of it, and was directed by Woodworth not to deliver it to the plaintiff; that Woodworth had personal property, other than the grain, after the note became due, and up to the time of the bringing of this suit, which the plaintiff might have attached, and by which he might have secured the note, of which he was informed by judge Solace, who told him he would collect the note for him if he wished.

Upon this evidence the court gave judgment for the plaintiff, to which the defendant excepted.

H. Seymour, for principal debtor and trustees.

I. As to the action against the trustees. The statute in relation to trustees, does not authorize the court to compel the person charged as trustee, to do that which he had never agreed to do, or that which the principal debtor could not require him to do. The property conveyed by Mrs. Stick-

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les to the Ferres, was paid for by them in such a way as was agreeable to their feelings, and within their ability, and was doing that for her which her age and infirmities required. The contract was such as the parties had a right to make, and one that was adapted to the convenience of both. If the plaintiff chose to treat this conveyance, for any cause, as void, he should have attached the property as Mrs. Stickles', and taken the responsibility of the result of a trial as to the validity of the transfer.

The plaintiff had no right to claim that the court should decide this conveyance to be fraudulent, without the finding of a jury, and without any testimony as to the facts of the case. If the court could properly decide that the conveyance was void, could the court arbitrarily determine what sum of money the Ferres should pay? There was no testimony shewing the value of the cattle—what was paid out for wintering them—what was the expense of supporting Mrs. Stickles the first year—whether there was any profit from the land the first year, or could be any, until Woodworth had taken off his crops, in the summer of 1841; and without such testimony, the court could have had no rule to govern them in deciding that the Ferres had effects and were liable as trustees, to the amount of plaintiff's note and the costs of the suit.

The case is not one that comes within the trustee act, and judgment should have been, that the Ferres were not chargeable as trustees, and that they be discharged with costs. *Baxter & Edmunds* v. *Currier*, 13 Vt. R. 615; *Burke* v. *Whitcomb*, 13 Vt. R. 421; *Hutchins* v. *Hawley*, 9 Vt. R. 295.

II. As to the action on the note. It appears that Woodworth was the principal, and the defendant surety. The wheat and rye were so far payment of the note, that plaintiff had no right to relinquish them to Woodworth to the injury of the surety. The surety has a right to require of the plaintiff the application of their proceeds as payment. To say that the plaintiff may relinquish property put in his control for the purpose of securing the payment of the debt, without thereby releasing the surety, is to say that the creditor may collude with the debtor, for the purpose of throwing the loss on the surety. The principles that courts have adopted to

protect the right of sureties are extensive enough to embrace this case. 2 Eq. Dig. 456, 459; 13 Johns. 174; 3 Paig. R. 117; 16 Johns. 152; Fell on Guarantees 214, 215; *Strong & Delano* v. *Wooster*, 6 Vt. R. 537; *McCollum* v. *Hinckley*, 9 Vt. R. 146.

C. Linsley, for plaintiff.

I. The bill of sale by Woodworth conveyed no right that could be legally enforced, as no possession by plaintiff was, or could be, taken; and before plaintiff obtained any possession, Woodworth cut the grain and took it away. The plaintiff, by taking any real or supposed collateral security, did not release the defendant or Woodworth. The taking collateral security does not prevent the creditor from proceeding to collect his debt, without resorting to the security. But here there was no security obtained in fact, and the plaintiff was under no obligation to enter into a contract for the grain. If the defence on this point is well founded, the plaintiff's right of action was suspended from January till August, and that, too, by mere force of collateral security, and without any pretence of a contract to that effect.

II. The only remaining point to consider, is, whether the plaintiff is to be defeated in this action because he did not think proper to attach such property as judge Solace suggested he might attach. This was a joint and several note, and the liability of the signers was equal, as it regards the creditor, and the case shows that it was on the faith of Miriam Stickles' promise that plaintiff parted with his property. When the note came to maturity, she was legally and morally bound to pay the money, if Woodworth did not. She had nothing to do but to pay the note, and then she could have proceeded against any property she conceived Woodworth possessed, and could have controlled that proceeding at her pleasure. Even a court of chancery will not compel a creditor to proceed against a principal, for the benefit of the surety, unless the surety first indemnify and save harmless the creditor; and it may well be doubted whether a court of chancery can legally or properly compel a creditor to forego the prosecution of the surety and resort to the principal. *Hays* v. *Wood*, 4 Johns. Ch. R. 131; *King* v. *Baldwin*, 2 Johns. Ch. R. 559; 8 Serg. & Rawl. 114.

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No question was made below, but that the trustees had ample property. It was only insisted that by force of the contract to support Mrs. Stickles, it was put beyond the reach of creditors. The question of the amount of property was a fact found by county court, and not examinable here.

The opinion of the court was delivered by

HEBARD, J.—This was an action upon a promissory note, against the defendant, and one Woodworth, for whom the defendant signed as surety. The defendant contends that the plaintiff, is not entitled to judgment against her, she being surety, for two reasons.

1. Because the said Woodworth had put certain securities into plaintiff's hands, of which he has not availed himself.

2. Because, after the note became due, the plaintiff was shown personal property belonging to Woodworth, that he might have attached.

In relation to the first, it is enough, perhaps, to say, that it does not appear that any security was put into his hands, of which, even with diligence, he could have availed himself. It appears that Woodworth gave the plaintiff, a bill of sale of some standing grain, but Woodworth controlled it and refused to let plaintiff have it, and we are not prepared to say that the plaintiff must go into an uncertain law suit about the grain before he can have his action against the defendant. But the law is not very well settled, that a creditor may not relinquish security that is under his control, and then resort to the undersigner of the note. The case of *The Bank of Montpelier* v. *Dixon*, 4 Vt. R. 587, seems to recognize the doctrine, that security may be relinquished and the undersigner pursued to the fullest extent. The payee of the note may give up such security as he may have obtained, at his own suggestion, without any assistance from the surety, provided he acts in good faith, and only with reference to his own interest. But as we do not discover that the plaintiff, had any security that he could control, he had a right to his action against the surety.

In regard to the second objection, we think the payee of a note is never bound to regard the directions of the surety.

If the surety wishes to have the property of the principal attached, he may, at any time, pay up the note and attach for his own benefit.

The other branch of the case presents the question, whether the trustees are to be holden upon their disclosures, for the property which they bought of the defendant.

It seems, that one week before the plaintiff's note fell due, they took a sweeping sale of all the property of which the defendant was possessed, real and personal, and obligated themselves, that they would support her for the same, as the only consideration, paying nothing and agreeing to pay nothing, only by way of support—and leaving nothing for the payment of debts. Now if the law would tolerate a proceeding like this, any person, having the means, may make ample provision for himself and family during life, at the expense of his creditors. But that would not be permitted. We think this transaction strongly marked with fraud, and that this whole property, notwithstanding the sale, was liable to attachment as the property of the defendant. The authorities referred to, to show that this, being a fraudulent sale, could not be the subject of a trustee process, have reference to the statutes as they were before the revision.

Perhaps, the judgment of the county court would have been more technically correct, if it had adjudged them trustees for the specific articles of personal property which they received of the defendant, instead of adjudging them trustees generally; but as there appears to have been enough personal property to cover the plaintiff's damage and cost, and as it is probable, that, at this time, much of the property may have been changed, or gone out of existence, we presume that the trustees would prefer to have the judgment affirmed here, rather than to have have it reversed and sent back merely for informality.

The judgment of the county court is affirmed.

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HARRIETT S. FOOT *v.* JOSEPH C. KETCHUM and CALVIN A. SHAW.

And

ALLEN KETCHUM *v.* HARRIETT S. FOOT.

(In Chancery.)

If demands are, in reality, mutual, though not nominally so, and equity requires a set-off to be made, chancery will make it.

The assignee of a chose in action takes it subject to all the equity existing at the time, in the original obligor or debtor.

A negotiable note assigned by parol, after it has ceased to be current, is subject to the same rule.

A promise, without consideration, by the obligor to the assignee, after assignment, to pay the demand, and which had, in no way, been made the basis of action, or an occasion of prejudice to the assignee, cannot, as matter of law, estop or conclude the obligor from setting up an equitable set-off against the assignee, which existed against the assignor, at the time of the assignment.

Before accounts can be set off in chancery, they must be liquidated.

Where the assignee of a note instituted a suit on it in the name of the payees, and the maker filed a declaration on book, in off-set, against one of the payees, to whom the note belonged, and from whom the assignee claimed, and there was a judgment to account, and a trial before the auditors, at which the assignee appeared and defended, it was held that the report of the auditors, which had been returned to, and accepted by, the court, was a sufficient liquidation of the account of the maker of the note, to make it the basis of a set-off in chancery, against the assignee.

THIS was an appeal from a decree of the court of chancery.

The oratrix, Harriett S. Foot, in her bill, set forth and charged, in substance, that previous to the 26th of February, 1836, the said Joseph C. Ketchum and Calvin A. Shaw were copartners in trade under the firm of Ketchum & Shaw, and that mutual accounts current existed between the said Ketchum & Shaw and the oratrix, and that the oratrix had, at the same time, a large account against the said Ketchum; that on the said 26th of February, the oratrix executed her note, payable on demand, to Ketchum & Shaw for $404.94, being the balance of their copartnership account against her, upon their assurance that the balance of her claim against Ketchum should, when ascertained, be applied on said note, and that what should thereafter become due from Ketchum, for rent, or otherwise, should be, also,

applied thereon, and that, in the settlement of the partnership concerns—the said partnership having been previously dissolved—the note should become the sole property of Ketchum;—which note, the oratrix alleged, was actually set to Ketchum, in the settlement of the partnership concerns, as his property, and continued in his possession until he absconded from the state.

And the oratrix further alleged, that after the dissolution of said copartnership, the said Ketchum occupied the store of the oratrix, and that she boarded him, and advanced him money, and delivered him various articles of property, and rendered him services, upon his agreement that her account for the same should be applied on said note, and that, no settlement of said accounts having been made, Ketchum, on the 20th of November, 1837, absconded from the state, insolvent, and had not returned.

And the oratrix further set forth and charged that, subsequently to the said 20th of November, the said Ketchum and his confederates procured a suit to be commenced against her, on said note, in the name of Ketchum & Shaw, which was entered at the June term, 1838, of Addison county court, at which term she filed her declaration on book against Ketchum, in off-set, with averments, showing that said note was, and always had been, the sole property of Ketchum, and was subject to the off-set claimed; that Ketchum appeared by attorney, and a judgment to account was rendered, and auditors were appointed to examine and adjust the accounts, who proceeded—the said Ketchum appearing before them by attorney—to adjust the accounts between him and the oratrix, and at the December term, 1838, of said court, reported a balance due to her from Ketchum of $444.49, and $17.86 costs before the auditors—which report was accepted by the court, and judgment rendered thereon; that, at said last mentioned term, the oratrix filed her plea in off-set to the action on said note, in assumpsit, by reason of the indebtedness of said Ketchum to her, for two promissory notes, one for $50.08, signed by John Perry, the other for $26.11, signed by Abram Dunning, the property of the oratrix, and obtained by Ketchum and appropriated to his own use, and moved the court to set off the sum found due her by said auditors, together with

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the sum due on said two promissory notes, on the judgment against her in favor of Ketchum & Shaw; and that, at the June term, 1839, the court decided against the allowance of said claims in off-set, and rendered judgment against the oratrix for the full amount of said note, to which decision she excepted, and the exception was allowed, and the cause sent to the supreme court for their decision thereon.

The oratrix prayed that the court would decree that the sum found and reported by the auditors, together with the the costs before them, and, also, the amount of said notes of Perry and Dunning, should be set off on the judgment in said suit of Ketchum & Shaw, and that the balance be decreed to her, and the said Ketchum & Shaw be enjoined from proceeding, at law, against her, in the suit aforesaid.

To this bill there was no answer, and it was taken as confessed.

And at the same term of the court of chancery, Allen Ketchum came into court by his solicitor, and filed his cross bill against the said Harriett S. Foot, in which he set forth and charged, among other things, that Joseph C. Ketchum, having procured the orator to become surety to a large amount, for him and for the firm of Ketchum & Shaw, turned out to the orator, on the 20th of November, 1837, as an indemnity for said liabilities, the note in question, which the orator received in good faith as such indemnity, and that an account of Ketchum & Shaw against said Harriett, showing a balance due them, of near $400, was, at the same time, and for the same purpose, transferred to the orator; that within two or three weeks, he notified the said Harriett S. of the transfer to him of said note, who thereupon promised to pay the same; that he subsequently caused a suit to be commenced thereon, in the name of Ketchum & Shaw, upon the entering of which, in court, the said Harriett S. filed her declaration on book against said Ketchum, upon which the proceedings were had, described in the bill of the said Harriett S.; that the account presented by her to the auditors in that case, and allowed by them, contained a large number of items which had not been entered on her book until after the commencement of said suit against her; and that, upon a just settlement of the several matters of book account between the said Harriett S. and Joseph C., there

would be a balance due to him exclusive of the note in question.

And the orator further alleged that Joseph C. Ketchum received the said note as part of the assets of the firm of Ketchum & Shaw, for the purpose of extinguishing its liabilities; that there was no agreement that the note should be off-set upon J. C. Ketchum's private account, but that it, in fact, comprehended the balance due on that account; and that the notes of Perry and Dunning, described in the bill of the said Harriett S., came into the hands of the said Joseph C., as her agent for the collection of the same, and that he had received nothing thereon.

The said Allen prayed that the injunction obtained by the said Harriett S. against the prosecution of the suit on said note, might be dissolved, and that he might be permitted to proceed in the collection of the same.

The said Harriet S. made answer to the cross bill, and therein denied its allegations, excepting those which were coincident with the allegations in her bill against Ketchum and Shaw. The answer was traversed and testimony taken. Among the witnesses who testified was E. W. Drury, to whom, with Allen Ketchum, the said Joseph C. at the time of transferring the note in question to the said Allen, made a general assignment of his notes and accounts, first for the security of said Drury, and then as indemnity to said Allen. The facts found, sufficiently appear in the opinion of the court.

The chancellor, upon a hearing, decreed that the cross bill be dismissed with costs for the defendant, and that the amount found due by the auditors, together with a certain sum collected upon the note of Abram Dunning, be set off and applied in satisfaction of the said judgment in favor of Ketchum & Shaw; that the balance should be paid by J. C. Ketchum, to the said Harriett S. Foot, together with her costs in the action on the note, and the proceedings in off-set; and that Ketchum and Shaw, and Allen Ketchum should be enjoined from further prosecuting said judgment.

C. Linsley, solicitor for Ketchum & Shaw and Allen Ketchum.

I. The debts are not mutual, and can no more be off-set

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in chancery than at law. *Palmer* v. *Green*, 6 Conn. 14; *Duncan* v. *Lyon*, 3 Johns. Ch. R. 351; *Dale* v. *Clark*, 4 Johns. Ch. R. 11; *McDaniels* v. *Nelson*, 2 Cow. 173; Story Eq. Dig. 663.

II. Unliquidated demands cannot be off-set between the same parties, either in equity or in law. Our statute aids the party in liquidating a book debt, but then it must be a debt against the plaintiff, in the suit. If the party cannot succeed under a statute, a court of chancery cannot come in to enlarge the statute, or help out is supposed intentions. *Gardner* v. *Brown*, 2 Johns. 154; Statute, 213; *McDaniels* v. *Nelson*, 2 Conn. 173; 2 Story's Eq. 665. n.

III. The allegations in oratrix's bill, and the evidence put in by her, is evidence to vary the note, and inadmissible. It alleges that a note given to Ketchum & Shaw, for a debt due them, was, really, to be payable only to Ketchum; and it sets up that the contract was, not that she should pay this note, agreeably to its tenor, but that it should not be paid, and that her account should be off-set against it.

IV. It was fraudulent to give a note to Ketchum & Shaw for them to use as an operative and effective note, and, at the same time, stipulate that it should be defeated by a private account of the promisor against Ketchum; and especially the permitting the note to be in Ketchum's hands from year to year, as in the hands of Ketchum & Shaw, was calculated to deceive and defraud innocent persons. Indeed, giving a note and expressly promising to pay a given sum, should be held a waiver of any right to set-off a then existing debt. *Hendricks* v. *Judah*, 1 Johns. 319; *Sandford* v. *Mickles & Forman* 4 Johns, 224; 2 Chitty Eq. Dig. 1202.

V. The cross bill states, and the answer admits, that Allen Ketchum is a surety for a large amount for Ketchum & Shaw, and, as this note was given to Ketchum & Shaw, for a debt due to them, and on which there was no right of set-off, it was their property, and has gone to one who stands as surety for them, as an indemnity, which is the same as if it had gone directly to a creditor of the firm. Hence the property, if not restrained by this court, will go to pay the debts of the firm, instead of paying the individual debts of Ketchum, which is in accordance with the highest principles of equity.

VI. A person who takes over-due paper, it is said, is sub-

ject to all the equities existing at the time between the parties; but this is to be understood of the ostensible parties; and no case, it is believed, has extended the doctrine beyond this. But this must be understood of an equity that attaches to the bill itself, and not that a bill over-due, passing into third hands, on being sued, is to operate, on a bill in chancery, for a general settlement between the original parties.

VII. The statute authorizing the liquidation of a book debt, with a view to an offset, if not extended by loose and ill-judged construction, furnishes reasonable security to the party to be affected by it, for he may be a witness and testify against the claim; but here, Shaw could not be a witness, nor Allen Ketchum; and Joseph Ketchum, having failed, was only interested in enabling his mother-in-law, to avoid this debt. Hence, there has been no trial of this, by the persons really in interest. *Holland* v. *Makepeace*, 8 Mass. 418.

VIII. Allen Ketchum, having taken this paper for pre-existing debts and liabilities, is to be regarded as a purchaser for value. *Brush* v. *Scribner*, 11 Conn. 388.

IX. If there was an agreement when the note was given, that it should go into the hands of Ketchum, and that any private account that oratrix might have, should apply on it, still there was no consideration to support such a promise. No right of off-set then existed; and Mrs. Foot neither gave any thing, or surrendered any right she had. The debt is evidenced in a different way, but the same sum is due to Ketchum & Shaw, as before. It would be singular to hold, that the giving of a note for a pre-existing debt was a good consideration for defeating the debt, or make it the basis of a promise inconsistent with the terms of the note.

X. Where paper, over-due, is taken, which was subject to off-set at law, in the hands of the holder, yet, if, on being notified of the transfer, the maker do not claim the off-set, or, at least, if he do any act to mislead the holder or delude him, the off-set cannot prevail, even at law, because of the gross injustice.

When paper, over-due, passes into the hands of a *bona fide* holder, common honesty and fair dealing require of the maker to disclose any defence he may have, the moment he is applied to by the holder. Especially should this be so

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with us, where there is no general habit of meeting paper at maturity, as in more commercial communities; and consequently no suspicion attaches to a note because it is due.

It was not until Allen Ketchum had incurred costs, that this defence was disclosed; Mrs. Foot has, therefore, no equitable ground, on which to come into this court to claim its aid. *Mowry* v. *Todd*, 12 Mass. 282; *King* v. *Fowler*, 16 Mass. 397; *Eels* v. *Finch*, 5 Johns. 193; 6 Cow. 693.

XI. The decree is, perhaps, consistent with itself; but upon what equitable ground the oratrix is entitled to costs, it is somewhat difficult to discover. If there is any truth in the evidence she should pay costs. *Bant* v. *Bant*, 8 Pick. 343. The costs, in this case, in the suit at law, have been advanced by the attorney. *Hall* v. *Acley*, 2 Bos. & Pul. 28; *Middletown* v. *Hill*, 1 M. & S. 240.

H. Seymour and *P. Starr*, solicitors for Harriett S. Foot.

The grounds on which the offset is claimed are—

I. That the note, though nominally payable to Ketchum and Shaw, is, in fact, due to Ketchum alone. At the time the note was given, it was agreed by the parties to the note, that Shaw was to have no interest in it, but that it was to become Ketchum's property, and remain in his possession. This was the condition upon which Mrs. Foot signed the note; and it was so agreed, for the purpose of securing to her the application on the note of what Ketchum owed her, as, also, of the accruing rents and what she should thereafter let him have.

In conformity to this understanding, in the division made of the property between Shaw and Ketchum, this note was set to Ketchum as his individual property. It was never claimed nor controlled by Shaw, but was in the possession of Ketchum up to the time he absconded in November, 1837. In equity, therefore, the note is, in every respect, as to the offset, the same as if it had been made payable to Ketchum alone. *Pond* v. *Smith*, 4 Conn. R. 297; *Ferris* v. *Burton*, 1 Vt. R. 455; 2 Story's Equity, 664.

II. This is a case of mutual credit. Part of Mrs. Foot's account, as allowed by the auditors, $477, was for rents of her store and house that had accrued after the dissolution of the partnership between Ketchum & Shaw. The fact that

Ketchum was in possession, and sole owner, of the note, was the inducement to Mrs. Foot to permit the rents and other claims against him to accumulate to so large an amount. It was on the credit of this note that Ketchum was trusted so largely and for so long a time; and it was with a view to the payment of this note that Mrs. Foot did not require payment of her rents and other claims. No case of offset can have stronger equity than this, and no act be more fraudulent than the attempt by Ketchum to transfer the note. 2 Equity Digest, 93.

III. Joseph C. Ketchum was wholly insolvent, and was in the act of absconding from the state at the time of the pretended transfer of the note. His insolvency is shown by all the testimony in the case, and Mrs. Foot's claims against him, unless offset against the note, must be wholly lost. *Ferris* v. *Burton*, 1 Vt. R. 455; *Lindsey* v. *Jackson*, 2 Paige's Ch. R. 582; *Reed* v. *Bank of A.*, 1 do. 218.

The finding of the auditors, on a full hearing, all the parties interested being present, is satisfactory and conclusive proof of the balance that is justly due. In addition to the report of the auditors, the oratrix has put into this case testimony showing, beyond a doubt, that the services for which Mrs. Foot charged were rendered by her, and that the rents and property Ketchum was charged with, in her account, he had the benefit of, and ought to pay for, and did, at the time, expect to pay for.

The question, then, is, how were Mrs. Foot's rights affected or varied by the assignment to Allen Ketchum, or by what occurred subsequently to that time? It is insisted that the transfer of the note by Joseph C. Ketchum to Allen Ketchum could have no effect upon Mrs. Foot's right of offset, because the demands against Joseph C. Ketchum, which Mrs. Foot claims to have offset, had all accrued previous to the time when it is claimed that the note was transferred to Allen Ketchum. 1 Eq. Dig. 193–4; 5 Paige's Ch. R. 594; 13 Mass. R. 304; 1 Paige's Ch. R. 131; 2 Eq. Dig. 93. Allen Ketchum received the note subject to all Mrs. Foot's equities existing at the time of the transfer. 1. Because the note was then overdue, and had been for nearly two years. 2. Because Allen Ketchum advanced no value for the note. 11 Vt. R. 70; 5 Pick. R. 316; 1 Paige's Ch. R. 131, 320;

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1 Paige's R. 366; 5 Paige's C. R. 594. It may be observed, too, that the note was never endorsed to any one; and that the general description in the assignment to Allen Ketchum and Drury would include this note, and would seem to transfer the note, as well as the account against Mrs. Foot, to Mr. Drury.

The cross bill charges that Mrs. Foot's account against Ketchum is fraudulent and false. The answer of Mrs. Foot denies this, directly and fully. The finding of the auditors shows that her account was justly due. Besides this, the principal items of the account and almost the whole of it is shown to be just and reasonable by the testimony of several witnesses.

The cross bill further charges, that some two or three weeks after Joseph C. Ketchum had absconded, Mrs. Foot, on being notified of the transfer of the note, promised to pay it. This, too, is denied by the answer. But if, in the conversations testified to by the witnesses, Mrs. Foot did, in fact, say she would pay this note, or expressly promised to pay it, yet it would have no effect in this case, because there was no consideration for such promise. Allen Ketchum assumed no new liability, nor relinquished any former security, by reason of any thing said by Mrs. Foot in these conversations; nor was there any benefit received by Mrs. Foot, nor any promised, that would make a good consideration for a promise on her part.

It is obvious, from the testimony, that Mrs. Foot, in these conversations, had no intention of giving away her right, or of binding herself by any new agreement; but that she wished to convince those who took an interest in the matter, that whatever she did owe should be paid.

The opinion of the court was delivered by

BENNETT, J.—This case has come before us by an appeal from a decree of the chancellor of the third judicial circuit, and we are called upon to revise his proceedings. In February, 1836, the oratrix was indebted to Ketchum & Shaw, in about the sum of four hundred dollars, and gave them her note payable to their order on demand. The note has been prosecuted to final judgment, and the object of this bill is to procure a set-off of a claim which the oratrix has

against Joseph C. Ketchum, in payment of the judgment on the note. The first question which presents itself, is, whether the oratrix is entitled to the prayer of her bill, as against Ketchum & Shaw. We think it is well established by the testimony, that when the note was given, it was understood by the parties that it should become the private property of Joseph C. Ketchum. The testimony of Chas. K. Foot is full that such was the previous understanding between the oratrix and Mr. Shaw, and that it was expected that her claims against Joseph C. Ketchum would be applied on the note. The evidence is very ample that the note did, in fact, become the private property of Ketchum; and no question is made upon the evidence as to his insolvency, and indeed none can be made; and the note remained in the possession of Ketchum, up to the time he absconded in November, 1837. Though the rule in chancery, as well as at law, to authorize a set-off requires the debts to be between the same parties, yet, if the demands are, in reality, mutual, though not nominally so, and equity requires a set-off to be made, chancery will make it. It was so done in the case of *Ferris* v. *Burton*, 1 Vt. 439. This is according to the usual course of chancery proceeding; and it is too clear to admit of debate, that, as between the parties to the original bill, this is a proper case for a set-off.

But the important question arises on the cross bill of Allen Ketchum, who claims to come in as the assignee of Joseph C. Ketchum. Has he an equal, or a superior equity to the oratrix, which will enable him to defeat the set-off? There seems, from the testimony, to be some uncertainty as to the manner, the object, and conditions, upon which the note of Mrs. Foot went into the possession of Allen Ketchum. It was not included with the other demands in the written assignment of Joseph C. Ketchum. It is not endorsed; neither is its transfer evidenced by any note or memorandum in writing. If Joseph C. Ketchum, as it is claimed, on the eve of his leaving the state, passed the note over to Mr. Drury for the benefit of the orator in the cross bill, yet it was to indemnify him against liabilities which he had previously incurred, and not upon any new consideration advanced at the time. It was long after the note had ceased to be current, and in violation of all good faith between Joseph C.

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Ketchum and his mother-in-law, Mrs. Foot. No legal title to this note passed to Allen Ketchum, but, at most, only an equitable one; and, standing upon his equity, he cannot be in a better condition than Joseph C. Ketchum himself, and no new equity is created by force of the assignment.

It is a well settled doctrine that the assignee of a chose in action takes it, subject to all the equity existing at the time, in the original obligor or debtor. *Turton* v. *Benson*, 1 Peere Wms. 496; *Coles* v. *Jones*, 2 Vernon, 692; *Murry* v. *Lylburn*, 2 Johns. Chan. 442; *Norton* v. *Rose*, 2 Wash. R. 233, 254. Though the note was negotiable, yet, as it was not negotiated, and passed after it ceased to be current, the law merchant, as applicable to commercial paper, cannot aid the orator in the cross bill. All the claims of Mrs. Foot against Joseph C. Ketchum accrued before he parted with the note. When she consented to give the note, running to Ketchum & Shaw, she was assured the note was to become the private property of Ketchum; that any claims which she might have against Ketchum might be brought in in payment of it; and, after the settlement between Ketchum & Shaw, by which this note became the property of the former, and while he was renting the store of Mrs. Foot, and was the owner and holder of this note, there was an express agreement between them, that her claims should be set-off on the note, and that the balance, if any, should be paid out of the sale of her house, which Ketchum, at that time, contemplated buying. But the house was not sold; and Ketchum rented the same up to the time he left the country. In addition to this, Ketchum is insolvent. Here, then, we think there is an equity in Mrs. Foot to have the set-off made, superior to any which attaches to Allen Ketchum, and of which she ought not to be defeated by force of the assignment.

It has been said, in argument, that while the note was in the hands of Allen Ketchum, Mrs. Foot promised to pay it; and that she has thus precluded herself from the set-off. But from all the testimony in the case, and the circumstances attending the transaction, the fact of such promise being understandingly made rests in doubt. If such promise was made, it most probably had relation to the payment of such balance as, in the end, might be found due. It is evident

that Mrs. Foot was not in a situation to liquidate her claims against Joseph C. Ketchum, at any of the interviews between her and Mr. Drury; and, it is quite probable, was not advised as to what the precise standing of their relative claims in justice should be. But if there had been an absolute promise to pay the note, still it would not operate as an *estoppel* to this claim for the set-off. It was without consideration, made after Allen Ketchum had taken the note, and while J. C. Ketchum was insolvent, and out of the country, and was, in no way, made a ground of action by Allen Ketchum. If he had been induced to act upon it to his prejudice, it might have merited a different consideration. Such evidence, when investigating the standing and amount of her account, could be urged with propriety upon the consideration of the triers; and probably it might have been, in this very matter, before the auditors.

Before a set-off can be made, it is necessary that the account should have been liquidated by a master, or by some other means. In the present case, Allen Ketchum, claiming to be the assignee of the note, commenced his action on the note, and, as matter of defence, Mrs. Foot filed her declaration on book against Joseph C. Ketchum, in off-set. The counsel for Allen Ketchum, who appear upon the record for Ketchum & Shaw, appeared, and submitted, in the declaration on book, to a judgment to account, and the matter went to auditors. The counsel for Allen Ketchum appeared before the auditors with the private account of Joseph C. Ketchum; and there was a full, and, for aught that appears, an impartial trial; and the allegation that the account allowed by the auditors was unjust and fraudulent is without evidence to support it. All the evidence relative to the accounts now before us was, or might have been, before the auditors. Mr. Drury might as well have been examined as a witness then as now, and, for aught that appears, was examined. The auditors were competent men, whose impartiality and integrity is not to be questioned. The claims of Mrs. Foot were defended against by the same counsel who now appear to contest them, and who then had the same means of knowledge relative to them which they now have.

In regard to the account of Mrs. Foot, which accrued be-

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fore the settlement of Ketchum & Shaw's account by the giving of the note, and about which much has been said, the auditors find it was not included in that settlement. The settlement was made by Shaw, and it is quite reasonable to suppose that he might not settle the private accounts of his partner. The auditors allowed to Mrs. Foot, for washing, over two years, for lamps, wood, making fires, and for watching and nursing, one hundred fifty-six dollars. Though this might seem to be a large sum, yet, whether reasonable or not, must depend upon the circumstances of the case. The physicians who attended Mr. Ketchum in his sickness, and who testified before the auditors, and whose testimony was taken in the chancery court, did not think it an unreasonable sum. They probably have as good a knowledge about it as any one. The report of the auditors, when returned to the county court, was accepted without objection. The auditors did, no doubt, what they thought right, though their proceedings are now strongly called in question; but if we are not to consider the proceedings upon the declaration on book as conclusive—as *res adjudicata*—but that it is within the power of the court to open the accounts to further litigation before a master, still there would be no good reason to suppose that better justice would be done by the master, in this respect, than has been already done by the auditors. Indeed, considering there has been the lapse of about five years, since the accounts have been adjusted by the auditors, there is the less probability of a just result. On the whole, though it is possible injustice has been done, the court see no good reason for sending these accounts to a master; and we are disposed to adopt the liquidation by the auditors. Nothing should be allowed to Mrs. Foot on the Perry note; but she is entitled to have allowed her the small amount collected of Dunning. The amount, and the time of its receipt, are given in the testimony of Mr. Barber. This, added to the amount reported by the auditors, with the interest, exceeds the amount due on the note in controversy. The set-off was properly made by the chancellor; and as Allen Ketchum has resisted it against equity, he should pay costs upon his cross bill.

The decree of the chancellor should be affirmed, with additional costs, and the cause is remitted to the court of chancery, to be proceeded with accordingly.

Joseph Blanchard and Royal W. Peake v. George E. Stone.

(In Chancery.)

S. took a contract from D. to convey certain land, and assigned the same to B. & P., who finding, as they supposed, that the title was in a third person, obtained a conveyance from him, and gave up to D. the contract executed by him. *Held*, that B. & P. have no remedy in chancery against S.—the title to the land having failed—even though he might have fraudulently represented to them, upon the assignment, that D. had a good title.

When a party to a contract seeks to have it rescinded, he should be able to put the other party *in statu quo;* or, if unable, it should not be through his own negligence or fault.

This was an appeal from a decree of the court of chancery, dismissing the orators' bill.

The orators, in their bill, set forth and charged, in substance, that the defendant, on the 17th of June 1836, received from one George D. Douseman a contract for the conveyance to him, by a good and sufficient deed of warranty, of seven and a half acres of land in Milwaukie, territory of Wisconsin, upon the payment of the sum of $7.000, in four equal instalments—one of which was paid down, and the other three were to be paid semi-annually; that, on the 10th of September 1836, the defendant proposed to the orators to sell and transfer to them his interest in said contract, upon the payment to him of $3000, and, as an inducement to such purchase, falsely and fraudulently represented to them, that said land was owned by said Douseman, and was free from incumbrance; that, relying on said representation, the orators purchased of the defendant, his right in said contract, and took from him an assignment thereof, and paid him a certain portion of said $3000, and gave their notes for the balance thereof, and executed a bond, to convey a part of said land which the defendant had covenanted to convey to another, and also to discharge the remaining liabilities of the defendant under said contract with Douseman.

And the orators further alleged that, having paid Douseman the sums remaining due on said contract, they discovered that he had no title to said land, but that the title remained in the United States, and that there was a pre-

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tended title in one Talbot C. Douseman, which was encumbered by a mortgage to a large amount, and had become absolute in the mortgagee.

And the orators further alleged, that the defendant had commenced a suit on one of the notes given by them for the balance of the said $3,000, and prayed that he might be enjoined from further prosecuting the same, and be decreed to give up the remaining securities in his hands, and refund to the orators the sums paid by them as aforesaid.

The defendant, in his answer, admitted the facts set forth in the orator's bill, excepting those touching his alleged fraud in connexion with the transfer of said contract, in regard to which he denied having made any of the representations charged upon him as fraudulent in the orator's bill.

And the defendant further alleged that the orators, having paid the balance due to Douseman, and finding that the title was not in him, but, as they supposed, in Talbot C. Douseman, took a conveyance of the land from said Talbot C. and gave up to said George D. Douseman the contract assigned to them by the defendant as aforesaid.

The answer was traversed and testimony was taken.

C. Linsley, for orators.

If the allegations of the bill are sustained, it is a case for the court to relieve.

1. Even if the defendant ignorantly asserted the title to be in George D. Douseman, and the land free from incumbrance, and orators relied on it, and have acquired no title, the contract may be set aside. The land was encumbered with a mortgage. No title could, therefore, be given by Douseman. 7 C. L. 87.

There is a material distinction between a contract entered into on the faith of the representations of the seller, and one where the purchaser buys on view and examination of the thing sold. Where the purchaser relies on the representations of an auctioneer, or where the property is at a distance from the place of making the contract, the seller will be held to great precision in his statement. 7 C. L. 87; 33 do. 408; *Bank of Columbia* v. *Hazen*, 1 Peters, 461; *McFerren* v. *Taylor & Co.*, 3 Cranch 280; 2 Cowen, 129; 5 John s Ch. R. 174; 9 Ves. 19.

2. Whenever a contract is tainted with fraud, it is not merely voidable, but is treated in chancery and at law, as utterly void, if the party affected by it, chooses to bring the fraud to the notice of the court. *Norfolk* v. ——, Camp. R. 337; Story's Equity, 375 to 379, 196, 202, 246; Chitty on Contracts, 113, 114.

The fraud in this case is not a falsehood about the value, quantity, &c. of the property, about which there might be an error of judgment, but a palpable misrepresentation designed to inspire confidence in the title. 2 Esp. N. P. 262.

When a fraud is practiced, in making a contract, it is a reasonable presumption that it would not have been made but for the fraud; and hence it is to be set aside. 3 Pet. Cond. R. 527, 533; 3 Pet. 218. A court of chancery will never permit a party to obtain an advantage by the commission of a fraud.

The title of the land was in the United States—not subject to entry. Hence, any contract for the conveyance of it must be held void, for, as the whole people who own it, have a direct interest in the most unrestrained and free competition when it is brought into market, every act, having a tendency to raise up interests adverse to the public right, is against public policy.

To suffer contracts to be made in relation to the public domain, before a right can be acquired therein, would foster a dangerous spirit of speculation, injurious to the public interest. Contracts injurious to the public interest will not be permitted. Those in restraint of trade, or affecting the course of justice, and trading with an enemy are familiar examples. Chitty on Contracts, 217.

It is insisted that orators should have sooner objected, and that taking the deed from T. C. Douseman precluded them from rescinding the contract. But the decision of the land-office was not till March, 1838, when all had been done by orators they have ever done. The exact time when the orators knew of the failure of the title does not appear; but, it is to be presumed, from their residing in Vermont, that considerable time would elapse. The court can direct the orators to release to defendant, and that their names may be used in prosecuting Douseman. When a contract is obtained by fraud, the court will not allow technical objections

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or lapse of time to screen the party guilty of the fraud. When the money was paid, it was necessary to do so, to save a forfeiture, and it could not then be known but Douseman might procure a title. If there was some delay, after orators came to a knowledge of the total failure of title, their rights should not be affected by it, as the situation of the parties was, in the mean time, changed. *Haddock* v. *Williams*, 10 Ves. 570; *Boyer, Ex.* v. *Grantly*, 3 Pet. 210.

E. D. Barber, for defendant.

I. The orators are precluded from the relief sought, by their own acts. They proceeded, after discovering the alleged fraud, with the contract—made payments to George D. Douseman—discharged the bond between him and defendant—took a deed from T. C. Douseman, and, by a variety of acts, treated the contract as their own, and put it out of their power to place the defendant in the same situation he was in when the bargain was made between him and orators. They have never made any offer to rescind, and the contract still remains open. It is a general rule of law, that a party is not entitled to rescind a contract, unless the other party can be placed *in statu quo*. Chit. Con. 573.

Equity follows the law, and at law a party cannot recover back the price of a chattel, while the contract is left open and is treated by him as a subsisting contract, and, especially, while he retains and uses the chattels purchased. Chit. Con. 573; *Powers* v. *Barrett*, 1 Term R. 133; *Taylor* v. *Hare*, 1 New R. 260; *Shepard* v. *Temple*, 3 N. H. R. 455; *Ferguson* v. *Carrington*, 9 B. & C. 59; *Hunt* v. *Silk*, 5 East, 440; *Curtis* v. *Hannay*, 3 Esp. 80; *Fleming* v. *Simpson*, 1 Camp. 40, note; Stark. Ev. 1646; 7 East. 571; 2 Camp. 530; do. 416; 1 Stark. R. 140–477; *Archer* v. *Barrington*, 3 Stark. R. 175; *Speller* v. *Westlake*, 2 Barn. & Adol. 155; *Greenleaf* v. *Cook*, 2 Wheaton, 13; *Conner* v. *Henderson*, 15 Mass. R. 319.

In *Lawrence* v. *Dale et al.*, 3 Johns. Ch. R. 23, Chancellor Kent lays down the rule as follows:—"When a party 'intends to abandon or rescind a contract, on the ground of 'a violation of it by the other, he must do so promptly and 'decidedly, on the first information of such breach. If he 'negotiates with the party after knowledge, and prompts him

'to proceed in the work, it is a waiver of his right to rescind 'the contract." Affirmed in Error, 17 Johns. 437, in *McNevins et al.* v. *Livingston et al.* 1 Am. Ch. Dig. 157; do. 159.

If a party be induced to purchase a chattel by fraudulent representations of the seller, and, after discovering the fraud, continues to deal with it as his own, he cannot recover back the money paid for it. *Campbell* v. *Fleming*, 28 C. L. 29; *Archer* v. *Bamford*, 3 Stark. R. 175; *Kimball* v. *Cunningham*, 4 Mass. R. 502; *Barton* v. *Stewart*, 3 Wendell, 236; 1 Am. Ch. Dig. 159. And a discovery of a new ingredient in the fraud will not revive the right to rescind. 28 C. L. above cited; *Brimley* v. *Tibbetts*, 7 Green, 70; Chit. Con. 573, note 1. And if, having a right to rescind, he does any act to affirm the contract, he cannot afterwards rescind it. 4 Mass. 502.

By commencing a suit against T. C. Douseman, the orators affirmed the contract. When a contract has been procured by fraud, and the party seeks to rescind it in equity, the rule laid down by Mr. Jeremy, p. 484, is:—"This court will not, 'even when some consideration is given, which cannot be 'restored, rescind a contract, unless it is able to replace the 'parties in the situation in which they would have been if 'the same had not been entered into." 1 Hen. C. Dig. 143, 156, 157, 158.

II. The party who seeks a remedy by rescinding a contract, for some supposed wrong, must be guilty of no default himself. Chit. Con. 573. And the hardship of which he complains, must not be the consequence of his own folly or misconduct. *McDonald* v. *Neilson*, 2 Con. R. 139.

Equity does not favor him who has been guilty of laches himself. If he who seeks relief and damages has been guilty of an act or neglect, by which the opposite party has been deprived of any right or advantage he would otherwise have had, he has forfeited all right to assistance. The orators have been guilty in this respect. 1. Because they did not repudiate the contract upon the discovery of the fraud. 2. Because they took a deed from T. C. Douseman, which they were under no obligation to take by the contract between G. D. Douseman and defendant. 3. Because they did not refuse to take such deed and pursue G. D. Douse-

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man upon the contract, if he refused to give his own deed. 4. Because they did not promptly and effectually pursue T. C. Douseman on the covenants of his deed. It does not appear but that both the Dousemans are responsible.

The opinion of the court was delivered by

HEBARD, J.—The orators seek to recover back a sum of money, paid to defendant, and also to have him enjoined from prosecuting a suit for the recovery of a further sum, and that he shall be decreed to give up certain securities which he holds against the orators. The ground upon which this is sought, is that of alleged fraud in obtaining the money and securities in question.

It appears that that the defendant, having obtained a written obligation from George D. Douseman, to convey to him certain land, upon payment, to be subsequently made, of certain sums of money, sold and assigned his interest therein, to the orators, upon the payment, by them, of the money, and execution of the securities in question, among which securities was a bond by which they obligated themselves to complete the payments to Douseman, necessary to perfect his obligation to convey.

In the assignment of the contract from the defendant to the orators, there is nothing said about any title in Douseman, and no covenant or agreement in relation to the title to the land in any way. The orators paid the several instalments to Douseman, as they became due, except the last, which they paid six months in advance. At this time the orators had ascertained that George D. Douseman had no title to the land, but that the title was in one Talbot C. Douseman, as they supposed, and this subject to a heavy mortgage.

The question here arises, what ought the orators to have done? Should they have proceeded to pay up what was behind, after learning that George D. Douseman had no title? It is said, that unless they did, they would have had no claim upon him for what was paid, as there was a stipulation in the contract, "that if said payments should not be made by the time specified, in said contract, said Stone should forfeit all right, legal or equitable, to a conveyance of said premises." But, in that case, it was not necessary to make the last payment before the time. After they had learned these facts,

ought they not to have notified the defendant, and given him the offer of directing what should be done, in case they intended to have recourse to him?—for it is a maxim in chancery, that "he that seeks equity should do equity." These are all questions worthy of consideration, when looking after the equitable relations of the parties. But the orators, it may be, in the spirit of speculation so prevalent at that time, were not admonished to hesitate by the discovery of defective title, but consented to take a deed from Talbot C. Douseman, and gave up their contract and covenant for a good title, from George D. Douseman. Having done this, they had taken an entirely new security—such as the defendant had never relied upon, and such as would, under no circumstances, be available to him. In doing this, the orators took a step which they cannot retrace. When they found the title to be defective, and before giving up the contract, if they had chosen to have rescinded their contract with defendant, they could have placed him in *statu quo*. They could have put back into his hands, the covenants of George D. Douseman, which would have been good security for the defendant,—or they might have insisted upon a satisfactory deed from Douseman, and, in case he did not furnish it, with that paper they could have called upon him for their recompense. But when they bargained away the covenants and agreements of George D. Douseman, for those of Talbot C. Douseman, it became a matter of their own, and they have induced a state of things in which the defendant did not participate, and for which, if he is made accountable, he is left without a remedy. The transaction between the orators and defendant, must be regarded as a negotiation for the contract. It was not a purchase of the land, for the defendant had no title to it, and did not pretend to have any, but merely held the obligation of Douseman to give him a title.

This view of the case enables us to pass over many of the points raised in it, for, this point being settled, it is of little importance how is the law, or how are the facts in other respects. For, even if in point of fact, the defendant made false representations in relation to Douseman's title to the land, that would not justify the orators, after having discovered the defect in the title, still to go on and experiment upon the title, and if they, in the chapter of accidents and

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chances, could make something, to keep it, and if not, after having thrown away all security for themselves or the defendant, then to come back upon him for relief.

That the defendant made some representations about the title of Douseman, that were not true, is very probable—but that he knew them to be false, we have no very conclusive evidence.

The decree of the chancellor is affirmed.

RUTLAND COUNTY.

FEBRUARY TERM, 1843.

PRESENT HON. CHARLES K. WILLIAMS, *Chief Justice.*
" STEPHEN ROYCE, } *Assistant Justices.*
" MILO L. BENNETT, }
" WILLIAM HEBARD, }

STATE OF VERMONT *v.* ISAAC A. LATHROP.

In an indictment for obtaining goods and chattels by false pretences, it is necessary to allege that they were the property of some person, as in a case of larceny, or an excuse must be stated for not making the averment.

THIS was an indictment under the statute for obtaining goods by false pretences, with intent to defraud, &c.

There was a demurrer to the indictment, which was overruled. This was followed by a plea of not guilty, a trial by jury and a verdict of guilty. To a decision of the court upon a question of variance, and the charge to the jury, and also to the decision overruling the demurrer, the respondent excepted.

As the case was finally decided upon a single point in the demurrer, no further notice is here taken of the exceptions, or of the arguments of counsel, than as they relate to that point.

The indictment charged that the respondent, "contriving 'and intending, unlawfully, fraudulently and deceitfully, to 'cheat and defraud Roger Blake and German Hammond, 'doing business as copartners, by and under the name, style 'and firm of Blake & Hammond, of their goods and mer-'chandise, on the 25th day of January, 1841, with force and 'arms, at Brandon, in the county of Rutland aforesaid, did 'falsely, unlawfully, knowingly and designedly, fradulently 'and wickedly pretend to the said Blake & Hammond," &c. [Here followed a specification of the representations and a negation of their truth.] "And that the said Isaac A. Lath-

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'rop, by the said false pretences aforesaid, did then and there 'unlawfully, knowingly, and designedly, obtain from the said 'Blake & Hammond divers goods and merchandise, that is 'to say, twenty-five stoves, of great price and value, to wit: 'of the price and value of $550; four cauldrons, of the value 'of $40, and three nests of merlin kettles, of the value of '$16, with intent, then and there, to cheat and defraud the 'said Blake & Hammond of the same, to the great damage 'of the said Blake & Hammond, contrary to the form, force 'and effect of the statute," &c.

The following were the assigned causes of the demurrer, to wit: "That it is not set forth in said indictment who was 'the owner of said property in said indictment alleged to 'have been obtained by said Lathrop; nor is it alleged in all 'the material parts of the indictment that the acts complained 'of were done with a view to cheat and defraud any person 'or persons."

It appeared on the trial, that prior to the delivery of the goods to the respondent, Blake & Hammond had assigned all their property to trustees for the benefit of their creditors, and were doing business in the name of the trustees, for the creditors, and ultimately for their own benefit.

C. Linsley, for respondent.

It is not stated who was the owner of the property. It might be suspected, from the indictment, that Blake & Hammond were the owners; but this turns out to be a mistake, for they could have no interest in it, unless there was an amount of property in the hands of the trustees beyond the claims of creditors, of which there is no proof.

It must be conceded that, in prosecutions for larceny, the ownership of the property must be distinctly stated; and it is difficult to see why there is not the same necessity in the present case. It is a part of the description of the offence, for the same words might be used to several persons for obtaining different parcels of property, and if the respondent were indicted for obtaining the same goods of the trustees, as their own property, it would seem that the present indictment would constitute no bar, unless patched up by parol testimony. Archbold's P. C. 123, 427–8; *Regina* v. *Norton*, 8 Car. & Payne, 350.

W. C. Kittridge, state's attorney, for prosecution.

The indictment is framed upon the 15th section of chapter 95 of the Revised Statutes, which is nearly a transcript of 7 and 8 Geo. IV, chap. 29, sec. 53. See Roscoe C. Ev. 416; Arch. C. P. 276.

The indictment sets forth with sufficient certainty, that Blake & Hammond were the owners of the goods so obtained. It is unnecessary to state directly, as in larceny, that the goods were the property of the person defrauded. The language of the 6th section of the 95th chapter of Revised Statutes, relative to larceny, is, in this particular, materially different from that of the section on which the indictment in this case is founded. See also *King* v. *Airy*, 2 East, 30; *Young* v. *Rex*, in error, 3 Term R. 99. See precedents in Chitty's C. L. 1001–16–18; 4 Went. Plead. 78; and Arch. C. P. 279.

Although Blake & Hammond had assigned their property for the benefit of their creditors, the entire interest was in them, as it went to extinguish their liabilities. They were in actual possession, and were the persons actually defrauded as alleged. The case does not show how they became possessed of the property after a *bona fide* assignment; and it is to be presumed that they were always in possession by the consent of assignees and creditors, so that they were, in law, the owners; and any or all of their property was liable to be seized by any creditor who was not a party to the assignment. Arch. C. P. 300; *Rex* v. *Ball*, 1 Mood. C. C. 30.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — As one of the grounds of the demurrer is fatal to this indictment, the court do not deem it necessary to go into the other parts of the case.

The indictment is for obtaining certain goods and chattels of Blake & Hammond by false pretences. In an indictment for larceny it must be distinctly and positively alleged that the goods and chattels stolen were the property of some person named, or else some excuse must be stated for not naming the person who owned the property, as that it belongs to some person to the jurors unknown, &c. Archbold, C. P., in treating of the proof under an indictment for obtaining goods, &c., says that the prosecutor must prove the

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goods as stated in the indictment, for the rule in this respect, is the same as in larceny. In *King* v. *Douglass*, 1 Camp. 212, it was said to be a fatal variance if, on an indictment for obtaining money under false pretences, it appeared in evidence that the money did not belong to the person stated in the indictment, but to his servant; and the rule, in this particular was recognized to be the same as in an indictment for larceny. A more direct authority is found in the case of *Regina* v. *Norton*, 8 Car. & Payne, 350, in which, on an indictment under the statute 7 and 8 Geo. IV, c. 29, similar to the statute under which this indictment was found, it was held that the indictment was not good unless, in addition to the false pretences, it contains the requisites of a count for larceny; and if it do not allege the money, &c. obtained to be the property of any person, it will not be sufficient, inasmuch as it could not, in that state, be pleaded in bar to a subsequent indictment for larceny. The precedents to which we have been referred, particularly those for obtaining money, &c. by false tokens or pretences, either contain the allegation directly "of the moneys, &c. of the 'said A. B.," or that which is equivalent to a direct allegation of property. In this indictment, although it is sufficiently alleged that the intent was to obtain the goods and chattels of Blake & Hammond, and to defraud them of the same, it is not averred that the stoves, &c. were the property of Blake & Hammond. The indictment is defective in this particular, and should have been so adjudged by the county court, when the demurrer was decided. The judgment of the county court is reversed and judgment rendered that the indictment is insufficient.

STATE OF VERMONT *v.* The TOWN OF SHREWSBURY.

Parol testimony may be admitted to prove the division of a turnpike road into sections by the turnpike inspectors, for the purpose of sale, under the act of November 1, 1838, entitled "an act to facilitate the rendering of turnpike roads free roads."

Evidence of the motives with which a sale and transfer of a section of a turnpike road, under that statute, were made, is not admissible.

The appointment of an agent by a turnpike company to procure a division of their road into sections, and directing him to dispose of, and convey the same—a written application of the agent to the turnpike inspectors to divide the road—a division of the road by the inspectors—a conveyance of a section of it by the agent to persons styled "a company of individuals," and notice of the sale by the agent to the selectmen of a town through which the section runs, are sufficient to establish that such section has become a public road, so as to impose upon the town an obligation to keep the same in repair.

It is not necessary that there should be a definite contract of partnership to constitute "a company of persons," competent to take a conveyance under said act.

THIS was an indictment for not repairing a road. The road in question was a part of the Green Mountain Turnpike. Plea not guilty, and trial by jury.

On the trial in the county court, the attorney for the state introduced the records of the Green Mountain Turnpike Company, showing the appointment of Alexander S. Campbell, as agent of said company, and giving him authority to procure a division of said turnpike road into sections, and to dispose of the same, agreeably to a law of the 1st November, 1838, entitled "an act to facilitate the rendering of turnpike roads free roads." The said attorney also introduced a letter of said agent to the turnpike inspectors for the county of Rutland, requesting them to make a division of said turnpike into sections agreeably to the provisions of the said act.

The attorney for the state then introduced one of the said turnpike inspectors to prove that said turnpike had been divided into sections by said inspectors. The testimony was objected to by the defendant, but was admitted by the court. It was proved by said inspector, that all that part of the Green Mountain Turnpike lying in Rutland county, was apportioned to one gate, without reference to the length of the said turnpike in Windsor county—into which it extended—

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or the number of gates on the part of it in that county, and that the said division and apportionment was made in February, 1839.

The said attorney then introduced a deed from said Alex. S. Campbell, as agent as aforesaid, to Thomas Gould, Samuel L. Billings and Harvey Wood, of all that part of said turnpike lying in Rutland county, for the purposes, and agreeably to the provisions, of said act.

The attorney then introduced a notice which had been left with the selectmen of Mount Holley, signed by the said Gould, Billings and Wood, to the effect that they had become proprietors of the portion of said road in the county of Rutland, and that they had no intention of making any use of said road, or taking any toll at the gate on the same, and that they relinquished all right and title to toll at said gate. It was admitted that the gate had been open from and after said conveyance.

The attorney then—having proved its destruction—gave parol evidence of the contents of a letter of the said Campbell, to the selectmen of Shrewsbury, notifying them that the Turnpike Company had sold the section of their road lying in Rutland county.

The attorney also gave in evidence a copy of the record of a warning of a meeting of the town of Shrewsbury, for the purpose, among others, of determining what method the town would take in regard to repairing the Green Mountain Turnpike, and of the proceedings of the meeting, among which there was a vote that the town would not accept said turnpike.

No evidence other than the foregoing was introduced to show notice to the selectmen of Shrewsbury of the transfer of the turnpike.

It was admitted that the said grantees of the turnpike company had no written articles of partnership.

The defendant offered evidence tending to show a fraudulent intent on the part of the said turnpike company, and the said purchasers, in making and accepting said transfer; which was objected to by the attorney for the state, and rejected by the court.

Upon this evidence, the court decided, and charged the jury, that the said turnpike had become a public road, and

that the town of Shrewsbury was bound to keep the same in repair.

The jury returned a verdict of guilty, and the defendant excepted.

E. F. Hodges & E. N. Briggs, for defendant.

I. Does the bill of exceptions set forth such proceedings on the part of the corporation as to divest it of the liabilities accruing under the charter, and throw its responsibilities upon the town?

1. The division by the inspectors should have been in writing. It was not competent to prove it by parol. The R. S. 146, provides that all orders and decisions of the inspectors shall be in writing, and filed in the clerk's office. The same rule should be applied in the proceedings under the act of 1838. *State* v. *Day*, 3 Vt. R. 138.

2. The inspectors, in dividing the road, did not proceed agreeably to the statute; and the sale, under their division, is void. A legal division, under the statute, is a condition precedent, attached to the right to claim the benefit of the act of 1838. The statute cannot be enlarged by construction for the benefit of the corporation. 4 Mass. R. 195; 2 do. 146; 8 Vt. R. 401.

3. The corporation should have given notice to the town that this was a free road. Dwallis on Stat. 662–664–685; *Protector* v. *Ashfield*, Hard. 62; 19 C. L. R. 42; 5 Bur. R. 2661; 3 Vt. R. 590; 6 Bac. Ab. 387. The notice to Mt. Holley was of no effect as to Shrewsbury.

4. The testimony furnishes no proof of notice. The warning of the town meeting was only the act of the selectmen. The vote was an express denial of liability. At all events, if notice were necessary, the court should have left it to the jury to say whether notice was proved. 7. Vt. R. 125; 3 do. 326, 461; 10. do. 458; Phil. Ev. 75.

II. The evidence detailed in the bill of exceptions, and upon which the court decided, and charged the jury, that the turnpike had become a public road, and that the defendant was bound to repair it, was insufficient.

1. The purchase of the road by individuals, under the act of 1838, could not make the town liable to keep it in repair, and would not authorize it to expend the highway taxes

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upon it, because the purchasers had the right, by the 3d section of the act, to keep up the gate and take toll. The deed to the grantees, in this case, was, by its terms, given to make the road a free road at the end of five years now unexpired.

2. The obligation of towns to keep in repair highways, refers to highways laid according to law, by the selectmen, or by the county or supreme court, and perhaps by prescription. In *Commonwealth* v. *Weston*, 1 Pick. 186, it was held that, when a county road was discontinued, being superceded by a turnpike road passing over, or near it, and the turnpike corporation was, afterwards, relieved from their obligation to repair the road, the town through which it passed was not bound to keep it in repair. *Commonwealth* v. *Charlestown*, 1 Pick. 188; *do.* v. *Worcester T. Co.*, 3. Pick. 330; *Goshen & Sharon T. Co.* v. *Sears*, 7 Conn. 86.

3. The language of the act of 1838 does not expressly fasten liability upon the towns, which it should do, in order to sustain the verdict; and a remedy by indictment for neglect should also be given by it. 6 Bac. Ab. 391: 2 Johns. R. 379; 1 Mass. R. 167.

4. A penalty will not arise by implication. The general statute on the subject of highways, provides that certain proceedings shall be had, previous to laying out and opening roads. The words of the act of 1838 do not carry with them, save by a very liberal and almost fanciful implication, the liability which exists in other cases, and which is founded on previous proceedings of a formal character, and made notorious by public records. The declaration in the statute that "the road or section of road, so purchased, shall become a town or county road, as the case may be," cannot bring the road within the penal clause of the statute on which this indictment is founded. Slade's Ed. Stat. 432 §13, 436 §4, 439 §5; 2 Johns. R. 379; 4 U. S. Cond. R. 64, 596, 283; 6 Bac. Ab. 391–2; 20 C. L. R. 340; 1 U. S. Cond. R. 425; 2 Brod. & Bing. 30; 1 Caine's R. 260; 4 Mass. R. 145; Dwallis on Stat. 76–7; 3 Bing. R. 580; 1. Pick. R. 136; 1 Black. Com. 91; 2 Johns. R. 263; 3. Vt. R. 590; 1 Mass. R. 167; 2 Barn. & Ald. 515; 4 do. 200.

III. If the Legislature intended, by the act of 1838, to

subject the towns for not repairing these roads, the act is unconstitutional and void.

1. An easement in the land over which the road was laid was granted to the turnpike company for a particular purpose, and upon certain conditions. When these purposes are answered, or the conditions broken, the easement reverts to the grantors. Pamphlet acts, 1799, 39; 11 Vt. R. 369.

2. The act of 1838 declares that, when certain proceedings have been had, this easement shall cease to be corporate property. The corporation, by complying with the requisitions of that act, have become, so far as this portion of the road is concerned, dissolved, and the easement has become the property of the landholders. 12 Wend. 273; 2 Kent's Com.; 19 Johns. R. 457–74–5.

3. The question then arises—can the legislature, by a simple declaration, take this private property for public uses? It has no other power over it than it has over any other lands, and can take it only by paying the owners a compensation. Const. sec. 2; 17 Mass. R. 323; 4 Day's R. 328; 3 Dal. R. 386; 8 Johns. R. 388; 2 do. 263; 20 Com. L. R. 340.

IV. The court erred in excluding the evidence tending to show a fraudulent intent in the conveyance.

W. C. Kittridge, state's attorney, for prosecution.

The road in question was rendered a public road, agreeably to the provisions of the act of 1838, entitled "an act to facilitate the rendering of turnpike roads free roads." See acts of 1838, page 15.

1. The testimony of one of the turnpike inspectors was properly admitted, to prove the division of the turnpike into sections. The orders and acts of such inspectors, were not required to be recorded, or to be in writing, at the time of the division in this case.

2. There being but one gate upon that part of the turnpike lying in the county of Rutland, the inspectors were warranted in setting off into one section all that part of the turnpike, within the county, in accordance with the 1st and 3d sections of the act of 1838.

3. A company of individuals purchased of the corporation that section, agreeably to the 2d section of said act.

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And the act does not require or imply that there should be written articles of copartnership between such individuals, to give validity or effect to such conveyance.

4. The conveyance of the road in question having been duly made under, and agreeably to, the provisions of the act aforesaid, the road so purchased thereupon ceased to be corporate property, and became a public road, and thereupon, also, the obligation of the town of Shrewsbury, to keep that part thereof, situate within said town, in repair, commenced.

5. The case shows sufficient notice to the town of the sale of the road, from the letter of notice from the agent of the turnpike company, the notice to Mount Holly, by the purchasers of said road, the notorious fact that the gate was kept open from and after the 6th day of April 1839, and from the fact that the inhabitants of Shrewsbury were warned to meet, and did meet, in town meeting, April 27, 1839, to act, and they did act, upon the question of accepting this very road. The jury found the notice to the town sufficient.

6. The offer to prove fraud in the sale of the road, was properly rejected by the court. The sale was made agreeably to the authority, and under the sanction of law, in every particular, and the motive of it was immaterial to the issue.

The opinion of the court was delivered by

ROYCE, J.—The highway in question, is that part of the Green Mountain Turnpike Road, within the county of Rutland, which passes through the town of Shrewsbury. The case is to be determined upon the statute of November 1, A. D. 1838, entitled "An act to facilitate the making of turnpike roads free roads," and the proceedings had under it.

Two decisions of the county court, in the progress of the trial, were excepted to by the defendants:—1. In permitting the turnpike inspector to testify to the division of the road into sections; and 2. In excluding testimony to show a fraudulent purpose in the corporation, and those to whom this section of the road was sold, to cast the burden of the road upon the town.

It is sufficient to remark in reference to the first exception, that, as no question was made at the trial, as to the due ap-

pointment of the inspectors, no objection can now be sustained for want of proof upon that point; and as the statute, at the time of dividing the turnpike road, had not required the doings of inspectors to be recorded, or even to be entered down in writing, there could be no error in admitting the parol testimony.

The other exception proceeds upon a ground which is inadmissible. If the proceedings did not conform to the requirements of the statute, they were invalid for that reason; but if in conformity with the law, they are not to be adjudged void on account of the motives which may have actuated the parties concerned. The evidence offered to show those motives, was, therefore, correctly excluded.

The only remaining exception was to the charge of the judge,—"that the turnpike had become a public road, and the town of Shrewsbury was bound to repair the same." The sufficiency of the evidence to establish every necessary fact was assumed by the court; and in order to determine the correctness of the charge, it becomes necessary to notice the evidence, as it applies to the provisions of the statute. It appears that the records of the corporation were in evidence, showing the appointment of their annual officers in January, A. D. 1839, and a vote then passed, directing the agent to procure a division of the road into sections, in pursuance of the act of A. D. 1838, and directing said agent to dispose of and convey "so much of said road, or the whole, as he shall think for the interest of the corporation and the public." Next followed a written application of the agent to the turnpike inspectors for the county of Rutland, requesting them to divide the road into sections. The division was then proved, making one section of what was within the county of Rutland. A conveyance of this section of the road was next shown, executed by the agent to three persons styled "a company of individuals." Notice of this sale was communicated by said agent to the selectmen of Shrewsbury, and the grantees also notified the town of Mount Holly. If these proceedings were such as the statute contemplated, this portion of the turnpike, in the language of the act, ceased to be corporate property, and became a town or county road. And if so, the towns became bound, by general law, to keep it in repair.

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It is objected that the division was unjust in apportioning so much, and so expensive a part of the road to one gate. But the doings of the inspectors can scarcely be avoided collaterally, on the mere ground of indiscretion; and since there was but one gate upon the road, within the county, it is not readily seen how they could have divided the road differently. Had they attempted a different division, they must have made a section without a gate, and the purchasers of each section could not have reimbursed themselves from the subsequent tolls.

It is further objected, that no definite contract of partnership was shown to exist between the purchasers of this section. This does not seem to be required by the act. It is only necessary that they should agree to become joint owners of the property.

The objection that the original rights of the land owners are infringed by these proceedings, does not properly arise as a defence to this indictment.

The respondents can take nothing by their exceptions, and judgment must be entered on the verdict.

STATE OF VERMONT *v.* CARLTON A. MUNGER.

In an indictment against a person for selling spirituous liquors by the small measure, without a license, it is not necessary that it should be averred to whom they were sold, or the number of the persons.

An averment that the respondent sold *rum*, *brandy* and *gin*, is sufficient, without an averment that they were spirituous liquors.

The negation of license must be broad enough to cover all the sources from which it might have been obtained.

If the negation of license to sell is, as to quantity, coextensive with the quantity charged to be sold, it is sufficient.

The general negation—"not having a license to sell said liquors, *as aforesaid*," relates to the time of sale, and not to the time of finding of the bill, and is sufficient.

It is not necessary that the offence of selling spirituous liquors without license, should be charged to have been committed with force and arms.

Where a distinct sale of spirituous liquors is alleged to have been made on a day certain, the count is not vitiated by adding an averment of sales at divers times between that, and the finding of the bill; but the averment may be regarded as surplusage.

The respondent being one of the firm, and having made out a bill of the sale of goods at sundry times, in his own hand writing, upon which was

entered the sale of spirituous liquors by the small measure, at different times, and which had been receipted by him, such bill of sale is competent evidence to go to the jury to prove a sale; and the person to whom the sale was made need not be produced.

It is no valid objection that the sale purports, by the bill, to have been made on a different day from the one charged in the indictment.

It is not error for the court to charge the jury that, upon such evidence, they could find the respondent guilty.

THIS was an indictment as follows, for selling spirituous liquors by small measure.

"STATE OF VERMONT, *Rutland County, ss.*

'Be it remembered that, at a term of the county court 'begun and holden at Rutland, within and for the county of 'Rutland aforesaid, on the second Tuesday of September, in 'the year of our Lord one thousand eight hundred and forty, 'the grand jurors, within and for the body of the county of 'Rutland aforesaid, now here in court duly impannelled and 'sworn, upon their oath present, that Carlton A. Munger, of 'Rutland, in the county of Rutland aforesaid, on the first 'day of September in the year of our Lord one thousand 'eight hundred and forty, at Rutland aforesaid, did sell and 'dispose of, at his, the said Carlton A. Munger's store, in 'Rutland aforesaid, one gill of rum, one gill of brandy, one 'gill of gin, to divers persons, he the said Carlton A. Munger 'not having a license to sell said liquors as aforesaid, con-'trary to the form, force and effect of the statute in such 'case made and provided and against the peace and dignity 'of the state.

'And the grand jurors aforesaid, on their oath aforesaid, 'further present, that the said Carlton A. Munger, not hav-'ing a license to sell rum, brandy or gin by the half gill, gill, 'or half pint, did, on the first day of August, in the year of 'our Lord one thousand eight hundred and forty, and at 'divers other times between the day last aforesaid, and the 'time of this presentment, sell rum, brandy and gin, by the 'gill, half gill, and half pint, at his, the said Carlton A. Mun-'ger's store in Rutland, aforesaid, to divers citizens of this 'state, contrary to the form, force and effect of the statute 'in such case made and provided, and against the peace and 'dignity of the state."

Plea, not guilty.

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The attorney for the state introduced a bill of sale from the firm of Paige & Munger to one Samuel Stocker, in which were entered numerous half pints of rum and brandy, as sold to said Stocker, under dates previous to the first of August, 1840, and which was receipted in full, by the respondent under date of September 2, 1840. It was proved that the respondent was one of the said firm of Paige & Munger, and that the said bill was in his hand writing.

The respondent objected to the reading of the bill in evidence, because the person to whom it purported to have been made, and who appeared by it, to have purchased the liquor, was in the neighborhood, and might have been produced; and also for the reason that, by the bill, no liquor appeared to have been sold after the first of August, 1840.

The court overruled the objection, and the bill was read in evidence. The attorney for the state introduced no evidence of the sale of spirituous liquors by the respondent, other than the said bill of sale.

The court charged the jury, that if they believed the bill to have been made by the respondent, it would be evidence upon which they could find him guilty. The jury returned a verdict of guilty.

The respondent, after verdict, moved in arrest of judgment for insufficiency of the indictment, which motion was overruled by the court.

To the admission of the bill of sale, the charge of the court, and the overruling of the motion in arrest, the respondent excepted.

——— *Hodges*, for respondent.

I. Judgment cannot be rendered upon this indictment, because of its insufficiency.

1. The indictment does not set forth to whom the liquor was sold. The respondent is entitled to full notice of the offence, of his accusers, and of such circumstances as will put him upon his defence, and to have such a description of the matter charged as will enable him to plead his acquittal or conviction in bar to a subsequent prosecution. 1 Stark. Ev. 63, 64; 1 Chit. C. L. 169, 172, 211, 212, 229; 9 Conn. R. 560; 2 Roll. Ab. 79; 2 Strange's R. 699; *King* v. *Horne*, Cowp. R. 682; *Kirby* v. *Perrott*, 2 M. & S. R. 386;

Cro. Eliz. 490; Cro. Jac. 20; 3 Bac. Ab. 558; *Comm'lth* v. *Maxwell*, 2 Pick. R. 139. The indictment, if the names are not stated, should, at least, aver that the purchasers were unknown to the jurors. 4 Com. Dig. 684, n.; 3 Chit. C. L. 672; 2 Hale's P. C. 184; 3 Mass. R. 126.

2. The second count is bad, for not alleging a particular day. An indictment with a *continuando* is a novelty, and there can be found no authority to sustain it. 3 Bac. Ab. 561; 10 Vt. R. 91; 5 T. R. 607; 2 Cowp. R. 828; 1 Saund. R. 24, n. 1; 3 T. R. 509.

3. *There is no sufficient denial of license.* If the indictment negatives the license at all, it must bring the denial within the statute. 2 Burr. R. 679; 3 Vt. R. 156; 1 T. R. 144; 1 Chit. C. L. 284; 1 Burr. R. 148; 2 do. 1035; Statute, 397, sec. 1.

4. The act of selling "foreign or domestic distilled spirit-'uous liquors" is a penal offence only by virtue of the prohibitory clause of the statute. The penal clause describes the offence in similar language, "spirituous liquors or wine." To charge the sale of brandy, rum, or gin, without averring that they are foreign or domestic distilled spiritous liquors, as an offence under this statute, is a legal absurdity. Stat. p. 400, § 25, p. 397, § 1; 1 Chit. C. L. 275–81–83; 4 Com. Dig. 539, n. q 1; 1 Mass. R. 516; 3 Bac. Ab. 569–70; 1 Chit. Plead. 267–8; 2 Ld. Ray. R. 791; 6 U. S. Cond. R. 573, 587; 8 Mass. R. 59; 1 Saund. 135, n. 3; 7 Pet. R. 139; 1 Show. 48; 2 Burr. 679; 1 T. R. 219; 8 T. R. 536; 6 Conn. R. 9.

II. The testimony objected to by the respondent was improperly admitted.

1. It is essential for the prosecuting officer, in criminal cases, to prove, 1, that some offence has been committed. 2. That the respondent is the wrong-doer. To prove these points, the best evidence the nature of the case will admit of must be produced, if it is at hand. The testimony objected to is not of this character, and the best testimony was to be had. 4 Mass. R. 646; 3 East's R. 193; 1 Cowp. R. 439; 15 Com. L. R. 399; 4 Esp. Cas. 163; Phil. Ev. 167–8, 111; 9 Cow. R. 30; 1 Chit. C. L. 566; 7 do. 563; 1 Pet. R. 596; 9 Conn. R. 278; Swift's Ev. 157; 12 Vt. R. 111;

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22 C. L. R. 305; 5 do. 377; 1 Pick. R. 375; 1 Root's R. 159; 10 Vt. R. 458; 3 do. 236; 2 Hale's P. C. 289.

2. If the testimony was admissible, it should have been taken from the jury, as too remote to justify a verdict. 11 Johns. 231; 2 Pet. 133; 1 Day's R. 312; 3 do. 227.

3. By the bill, no offence appears to have been committed after the 1st of August, though a number of times previous. For *which* of these did the jury convict? But one offence can be proved previous to the time set in the indictment. 1 Stark. R. 351.

III. The charge of the court was incorrect, in that the jury were told, if they believed the respondent *made the bill*, it would be evidence upon which they could find him guilty. 1 Day's R. 312; 3 do. 327; 5 Conn. R. 406; 6 do. 453; 15 Wend. R. 147; 6 Pet. R. 621; 2 do. 133; 3 Vt. R. 236; 10 do. 464.

In further support of the motion in arrest, we insist, 1. That the indictment is bad, as not containing the words *force* and *arms*. 2. The county court have no original jurisdiction of the offence. Rev. Stat. 160, § 8, 170, § 1, 400, §24, 466, § 2; 1 Caine's R. 37.

W. C. Kittridge, state's attorney, for prosecution.

1. The bill of sale being proved to be in the hand writing of the respondent, and receipted by him, was proper evidence for the jury to weigh as an admission that he had sold the liquors as specified in the bill. Roscoe's C. Ev. 34, 44; *Dernington's case*, 19 Eng. C. L. R. 199.

2. Rum, gin and brandy are different and distinct species of spirituous liquors. The latter term, as it is used in the statute, being a generic term, it is necessary to state the species according to the truth of the case, and the indictment would otherwise be insufficient. Arch. C. P. 47–8, 326; *King* v. *Chalkey*, R. & R. 258; *Paty's case*, 1 Leach, 72; Roscoe's C. Ev. 337; 2 East's P. C. 1074.

3. Time and place need not be proved as laid in the indictment. Arch. C. P. 37.

The opinion of the court was delivered by

BENNETT, J.—Under the motion in arrest, several objections are urged against the sufficiency of this indictment, which

we will first consider. The general requisites of an indictment require it to be framed with so much certainty, as to identify the offence, that the grand jury may not find a bill for one offence, and the prisoner be tried for another; and that he may know what accusation he has to meet, and the jury be able to give a verdict upon it, and the court to see such a definite crime, that they may apply the punishment which the law has prescribed, and the prisoner be able to plead his conviction or acquittal, in bar of a second prosecution for the same offence. It is said that the indictment is bad, because it is not averred to whom the liquor was sold, or that the person or persons are unknown. It is of no importance that the indictment should contain such an averment. The offence complained of, works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated. It has no analogy to an indictment for theft, to which it was likened by the counsel, where the violation of private right enters into the very essence of the crime. The case of the *Commonwealth* v. *Maxwell*, 2 Pick. R. 139, which has been much relied upon, is not in point. The indictment, in that case, was upon a statute which inflicted a specific penalty upon an inn-holder who should entertain, on the Lord's day, any persons who were not travellers, strangers, or lodgers; and the penalty was a fixed sum for each individual so entertained. In some of the counts in the indictment, it was alleged the respondent had entertained *certain individuals*, and in others, *divers persons*, &c. It was no objection, in that case, that the names of the persons were not given, but the want of the number, without which, as the statute gave a *per capita* penalty, the court, upon conviction, could not know what sentence to pass.

The statute upon which this indictment is founded, gives but one penalty for a single violation, and it is immaterial, whether the sale is to one, or divers individuals.

It is said the indictment is bad, for the want of an averment that rum, brandy and gin were spirituous liquors, but this objection is without foundation. Rum, brandy and gin are different *species* of spirituous liquor, considering that the *genus*; and the words, in and of themselves, import them to be spirituous liquors. Where the words have a settled, uniform and known meaning, and are universally understood as

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importing certain species of spirituous liquors, I know of no rule of pleading, that requires an *averment*, that they belong to their appropriate *genus*.

It is said there is no sufficient negation that the sale was without license. It is true, as was held in the case of the *State* v. *Sommers*, 3 Vt. R. 157, that the negation must be broad enough to cover all the sources from which a license might have been obtained. If it does it is sufficient. Unlike the case of *State* v. *Sommers*, the first count alleges that the respondent sold one gill of rum, &c., *not having a license to sell said liquors as aforesaid*.

Here, the words of negation are general, and without restriction; and we think they relate to the time of the sale, and not, as has been contended, to the time of finding the bill. If there was otherwise doubt, yet when the pleader adds to his words, denying that the respondent had any license to sell said liquors, the words "*as aforesaid*," these latter words clearly point to the time of sale.

In the second count, the allegation is, that, not having a license to sell rum &c., by the *half-gill, gill, or half-pint*, the respondent did sell rum, &c., *by the gill, half-gill and half-pint*. In this count, no question is made, but what the time of the negation is the time of the sale, and the words of negation, relative to the quantity of the liquor which the respondent had no license to sell, are cöextensive with the quantity which he is charged to have sold.

It is objected, that it is not alleged that the offence was committed with *force and arms*.

At the common law, in indictments for offences, which amounted to an actual disturbance of the peace, and were attended with forcible injuries, as an assault and battery, false imprisonment, and the like, the words *vi et armis* were held necessary; but in a case like the present, it would be absurd to require them, if not to use them; as much so as in indictment for libels, conspiracies, and the like. In such cases, they never were held necessary. 3 Bac. Ab. 564.

It is said the second count is bad, on the ground that the offence is laid with a *continuando*.

But it is to be remarked, that a single and distinct offence is charged to have been committed on a day certain; and what follows by way of a *continuando*, is clearly bad and

would be insufficient of itself to sustain a verdict. But the question now is, does the allegation of the commission of the offence, at divers other times between the 1st of August, 1840, and the time of the presentment of this bill, vitiate this count, so that as to this, the motion in arrest should prevail. The whole of this averment may be stricken out, and yet leave the count a perfect one. It is in no way inconsistent with the other facts alleged. It is altogether superfluous and useless, and may well be rejected as surplusage, according to the maxim, "*utile per inutile non vitiatur.*" If an offence, sufficient to maintain an indictment, be well laid, it is good enough, although other facts be ill laid. 3 Jacob's L. D. by Tomlins, 410.

On the whole, then, we think the motion in arrest was properly overruled.

In regard to the admissibility of the bill of goods sold to Samuel Stocker, there can be no doubt. It was proved that the respondent was one of the firm of Page & Munger, and that the bill was made out by the respondent himself. It contains sundry charges for the sale of rum and brandy by the half pint, and must be regarded as a direct admission by the respondent of such sale. There is nothing in the objection that Stocker should have been produced as a witness, or that it does not appear from the bill, that any sale was made after the first day of August, 1840. Stocker's testimony was no better in the degree, than the admissions of the respondent, and, perhaps, might have been less satisfactory. And the government were not bound to prove the sale on the precise day alleged in the indictment. Whether the evidence, in the opinion of the jury, would have been sufficient, is quite another question. It was undoubtedly necessary that the jury should have been satisfied that this respondent was engaged, personally, in the sale; and that this testimony had a tendency to prove it, no one can doubt. The court in their instructions to the jury, told them, if they believed the bill to have been made out by the respondent, it would be evidence upon which they could find the respondent guilty.

The respondent, in making out, and receiving pay upon, the bill as one of the partners, thus clearly recognized the sale as having been in fact made by the firm, and it is evi-

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dence to the jury, tending to prove he was personally concerned in it. The court, in effect, refer its sufficiency to the jury. The charge is not given, at length, and we are not to presume that adequate instructions were not given. We do not see that there was error in the court's telling the jury they *could*, upon such evidence, find the respondent guilty. The party excepting must state so much of the proceedings below as show affirmatively, that error has intervened.

The result is, the respondent takes nothing by his exceptions. He was sentenced to pay a fine of $20 and costs of prosecution.

STATE *v.* BENJAMIN WHITNEY.

In an indictment for selling spirituous liquors by the small measure, without license, the omission of the auxiliary verb "*did*," which should have been joined with the words "*sell and dispose of*," is not fatal upon a motion in arrest.

The county court have original jurisdiction in such case, though the fine is limited to ten dollars.

THIS was an indictment for selling spirituous liquors by small measure, which charged,—"That Benjamin Whitney, 'of Castleton in the county of Rutland aforesaid, on the first 'day of August, in the year of our Lord, one thousand 'eight hundred and forty two, at his, the said Benjamin 'Whitney's dwelling house in Castleton aforesaid, sell and 'dispose of, to divers persons, foreign and domestic distill-'ed spirituous liquors, in a less quantity than one pint, to 'wit, by the gill, half gill and half pint, he, the said Benja-'min Whitney, not having a license to sell such liquors as 'aforesaid," &c.

Plea, guilty.

After the plea, and before sentence, the respondent moved in arrest of judgment, upon the ground that the court had not jurisdiction of the offence charged in the indictment, but that the same was within the jurisdiction of a justice of the peace; and also for that the matters contained in said indictment, were insufficient, in law, to warrant any judgment to be rendered thereon against him.

The county court overruled the motion, to which decision the respondent excepted.

——— ———, for the respondent.

The respondent contends, that the county court cannot take cognisance of the offence (if any) charged in the indictment, but that the same is within the exclusive jurisdiction of a justice of the peace. Revised Statutes, 170, section 1; 400, § 24; 469, § 26; 78, § 49; 94, § 68; 174, § 46; 467, § 6; 176, § 66; 466, § 2.

The offence charged is an act expressly prohibited by statute, and imports a breach of the peace; but the indictment does not allege that it was done with force and arms, which is necessary in all cases, where it would not be absurd to use those words, 2 Hawk. P. C. ch. 25, § 90.

Neither is it alleged that, at the time of doing the act, the respondent had not a license to keep an inn or house of entertainment. The allegation, *not having a license to sell said liquors, &c.* refers to the time of finding the indictment, and cannot, by intendment be made to refer to the time of the sale. Hawk. P. C. ch. 64, § 38; *King* v. *Hazen*, 13 East. 141.

It is not alleged in the indictment that the respondent *did* any thing.

W. C. Kittridge, state's attorney, for the prosecution.

Justices of the peace have not jurisdiction in cases like the present, because:

1. The fine and cost are payable into the treasury of the county, and costs of prosecution are to be paid out of the same treasury. Rev. Stat. 400, § 23; 446, § 2 & 4. Justices have no authority to draw orders for cost on the county treasury, but upon the town treasuries only. Rev. Stat. 467, § 6. Supreme and county courts only are empowered to draw orders on the county treasury. Rev. Stat. 467, § 5.

2. Justices are required, under a penal forfeiture, to deliver an abstract, annually, of all fines and penalties imposed by them, to the treasury of the town, &c.; but are not required to make any such returns to the county treasury. Rev. Stat. 176, § 66 & 67.

State's attornies are required to pay over to the county treasuries, all fines and penalties belonging to the same, Rev. Stat. ch. 11, § 49., and county clerks are required to return a statement of fines and penalties assessed by the

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courts, to the clerk of the House of Representatives. Rev. Stat. ch. 11, § 63, Subd. 6.

3. It is, and should be, the policy of the legislature, to place all public officers who have power to assess or collect fines, under specific responsibilities by way of recognisance for the faithful execution of every particular trust. No such obligation is imposed on justices in respect to fines belonging to the county treasury.

4. The intention of the legislature to give the county court jurisdiction of these cases sufficiently appears from the 29th section of chapter 83, Revised Statutes; also see 469, sec. 26 of same.

The opinion of the court was delivered by

BENNETT, J.—We have had, at the present term of the court, an indictment before us, *(State* v. *Munger)* which was exposed to many of the objections, that are, and might be, raised to this. So far as the objections are the same, in the two cases, we need not repeat what was said in that case. We will only consider the points, wherein they differ. It is said, the omission of the auxiliary verb, *did*, which should have been joined with the verb, *sell*, (the use of which is as a helper to form the modes and tenses of other verbs) is fatal; that without it, there is no averment that the respondent has done any illegal act. If this conclusion is to follow, most certainly the objection is well taken. In *Williams et al* v. *Wilson et al*, 1 Vt. R. 271, it was held, on special demurrer, that, in a replication, the omission of the nominative pronoun, "they," which should have preceded the verbs "were damnified and did pay," was not fatal. In this indictment it is alleged, that the respondent, on the 1st day of August, A. D. 1842, at &c. *sell* and *dispose* of, &c. It is evident the omission is purely a clerical one, and the auxiliary verb may be supplied by intendment. In indictments, as well as in declarations, only the second degree of certainty is required, that is, certainty to a certain intent, in general, as it is usually expressed. 5 Coke's Rep. 121. It was also held, that false Latin did not hurt an indictment, if by any intendment, it could be made good. Nor would it be set aside for a false concord in the grammatical construction of a sentence, the expressions being sufficiently significant to

make the sense appear. 5 Jac. L. D. by Tomlins, 408; Cro. Jac. 465; 5 Coke's R. 121. The words, "sell and dispose of," express all the *action* which is imputed to the respondent, and no one can misapprehend their sense, in the connection in which they are used, and the helping verb will, at once, be supplied by intendment.

A question has been raised, as to the jurisdiction of this court.

The penalty upon a conviction in this case, is limited to ten dollars. By the Revised Statutes, p. 170, every justice of the peace is authorized to try and determine prosecutions of a criminal nature, where the punishment is by fine, not exceeding ten dollars. The words of the statute are broad enough to include the prosecution before us; and its obvious effect would be to give the jurisdiction, in cases like this, to a justice of the peace, unless we are satisfied, from an examination of the different provisions of the statute, that this was not the intention of the legislature. No mode is specially provided for the recovery of penalties for a breach of the license laws; and in all cases, in which there is no special provision, the statute 496, sec. 29, provides, that the penalties may be recovered by information or indictment. No indictment can be had before a justice of the peace. The penalty, in this case, goes to the county treasury. Statute, 400, sec. 25; and the costs of prosecution are to be paid out of the same treasury. Statute 467, sec. 4. By the Revised Statutes, p. 467, sec. 5 and 6, the supreme and county courts, alone, could draw orders upon the several county treasurers, and justices of the peace upon the treasurers of towns, liable for the costs of any prosecution. If, in this case, the prosecution is to be had before a justice, there is no provision in the statute for the payment of costs. It is made the duty of justices of the peace to return abstracts of all fines by them assessed, to the treasurer of the town, but they are not required to make any returns to county treasurers. And state's attornies are under bonds to pay over to the county treasurers, all fines belonging to the same. Statute, 176–78. In the construction of statutes, the court should endeavor to give them effect according to the intention of the legislature, although it seem contrary to the letter. 6 Bac. Abr. 384. In some cases the letter of the

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statute is *restrained;* in others, it is *enlarged;* while in others the construction is contrary to the letter, 6 Bac. Ab. 386; *Zouch* v. *Stowell*, Plow. 365. In construing a statute, it is an established rule of law, that all acts in "*pari materia*," are to be taken together, as if they were one law. *Ailsbury* v. *Pattison*. Doug. R. 30. We cannot think the legislature intended to give to justices jurisdiction in such cases as this, though included in the general words of the statute.

The result is, the respondent takes nothing by his exceptions.

He was sentenced to pay to the county treasury a fine of ten dollars and costs.

CHESTER CLEVELAND *v.* MARTIN WOODWARD.

C. had dealings with W., and W. employed him to labor on a farm which was owned and carried on by W. and another, in partnership; but the partnership was not known to C. until after suit commenced: *Held*, that C. might recover in the action against W. for the labor done for the partnership.

THIS was an action on book. There was a judgment to account, and reference to an auditor.

The auditor reported that the parties had appeared before him and exhibited their respective accounts, which accompanied his report; that "the defendant objected to the four 'last items in the plaintiff's account, and contended that 'they were improperly charged to *him*, because, at that time, 'he was in partnership with one Stillman Woodward, and 'said items were properly chargeable to the company. In 'relation to this, the auditor finds that said Martin and Still-'man Woodward had, a short time previous to the labor's 'being performed, for which said four charges are made, 'purchased the farm and stock, and carried on the same in 'company; that Martin Woodward contracted with the 'plaintiff for the labor of his boys—which was the subject of 'three of said charges—which was performed upon said farm 'for the benefit of said company; and that the plaintiff did 'not know of the existence of said partnership, until after the 'commencement of this suit."

The auditor thereupon reported that if, upon this finding,

the court should be of opinion that the charges in question were properly made to the defendant, then he finds and allows a balance for the plaintiff of $27.56; but if the court should be of opinion that said items ought not to be charged to the defendant, then he finds and allows a balance for the defendant of $9.04.

The auditor further reported that the last of said four items, being a charge of one dollar, had been specifically paid in an article charged the plaintiff in the company account.

Upon this report the court rendered judgment for the plaintiff, to which the defendant excepted.

—— ——, for defendant.

It is not pretended that Stillman Woodward was a dormant partner, or that there was a secret partnership, or that Martin Woodward made any agreement, in his individual capacity, to be separately liable. It only appears that one of the partners contracted for the work—not for his individual interest, but for the company; the services were rendered for the company, and the company were liable for them, and not the individual partner alone. The case of *Loomis* v. *Barrett*, 4 Vt. R. 450, is analogous to this. There, Barrett made the contract to build the school-house, and for the brick, and Loomis had no knowledge of his having a partner, and brought the suit for the brick against Barrett alone. Barrett proved that McGrath was his partner, who was not joined in the suit, and the court held that the suit could not be sustained against Barrett alone.

It is unlike the case of *Goddard* v. *Brown*, 4 Vt. R. 279, for, in that case, the court, in giving their opinion, go upon the ground that the partnership was virtually dissolved, by one of the parties having left the state, though there had been no formal dissolution.

This is unlike the case of *Taggart* v. *Phelps*, 10 Vt. R. 318. In that case, Phelps contracted with Taggart to board his driver, on the 13th of January, 1832, and he continued to board with him until the 15th of July, 1832. Taggart sold out one-half his stage property on the 24th of February, 1832, to Chamberlin, but gave no notice to Phelps to charge the board from that time to him and Chamberlin, but Phelps continued to board the driver upon the original contract with Taggart.

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S. H. Hodges and *E. F. Hodges*, for plaintiff.

The auditor has found that the last item in the plaintiff's account was paid, and has allowed nothing for it in effect. It may, therefore, be laid out of the case. The only other items in the plaintiff's account, objected to, are the three preceding the last. To exonerate himself from them, it is not enough for the defendant to show, as he has done, that he had formed a partnership with another, embracing those items in its scope of business. He must show farther— 1. That the partnership had the benefit of the services charged, respecting which it would seem that he offered no testimony; and 2. That the plaintiff contracted with the partnership; which is expressly contradicted by the finding of the auditor.

Where a secret partnership is concerned in a purchase, the vendor may, indeed, embrace the dormant partners in his action; but it is at his election to pursue the acting partner only. *Evans* v. *Drummond*, 4 Esp. N. P. C. 89. In order to restrain him from pursuing one alone, it must be shown that he contracted with the partnership. This may be presumed, we admit, from his knowledge of the existence of such a partnership, embracing the business. But where it appears, as in this case, that the plaintiff had no knowledge of the partnership, there is no room for such a presumption, and he may seek his remedy against the contracting party alone; especially where the party making the contract has previously been accustomed to deal with the plaintiff, he must not only apprise him that he has formed a partnership, but also notify him that he is acting in behalf of it, before he can turn the plaintiff over to an action against it. *Taggart* v. *Phelps*, 10 Vt. R. 318; *Goddard* v. *Brown*, 11 do. 278; *Baldney* v. *Ritchey*, 1 Stark. N. P. C. 338; *Doe* v. *Chippenden*, there cited; *Stanfield* v. *Levy*, 3 Stark. N. P. C. 8; *Mantort* v. *Saunders*, 1 B. & Ad. 398; *Mallet* v. *Hook*, 1 M. & M. 88.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — This case seems to be conclusively settled by authority. The plaintiff had dealings with the defendant. The only dispute is in relation to the four last items in the plaintiff's account, which were for labor per-

formed on a farm, of which the defendant and Stillman Woodward were owners, and which they carried on in company. The defendant contracted with the plaintiff for the labor, who did not know of the existence of the company until after the commencement of this suit. If these items are disallowed, the balance would be due to the defendant. It is to be remembered that it is only in this action that advantage can be taken of the non-joinder of a joint debtor, on trial of the merits. It is settled that a plaintiff cannot be compelled to be a creditor of two, one of whom he did not know, as his joint debtors, and not be the sole creditor of the one he does know. In the case of *Dubois* v. *Ludert*, 5 Taunt. 609, it was decided that if a man enters into a contract with one person, not knowing he has a partner, it is competent for that partner, being sued, to plead, in abatement, that he has other partners who are not joined. That case, however, stands alone, and is opposed to the decision in the case of *Baldney* v. *Ritchey*, 1 Stark. N. P. C. 338, *Doe* v. *Chippenden*, there cited; to the opinion of Lord Eldon, in *ex parte Norfolk*, 19 Ves. 455, and directly overruled by Lord Tenterdon, in *Mallet* v. *Hook*, 1 M. & M. 88, and by the court of king's bench, in the case of *Mantort* v. *Saunders*, 1 B. & Ad. 398. By these cases, it is fully settled that, even in the case of a general partnership, if a contract is made with one of two partners alone, and the plaintiff is not aware that he is dealing with the partnership, and it is not disclosed to him by the defendant with whom he deals, the non-joinder cannot be pleaded in abatement. *A fortiori*, it cannot be done in the action on book, where a failure to recover might endanger all the security he may have by attachment for his debt. The judgment of the county court is, therefore, affirmed.

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LEVI PLUMLEY v. WILLIAM MARSH.

Plumley v. Marsh.

The right of a plaintiff, after a review by the defendant in an action of assault and battery, to recover full costs upon the recovery of a sum in damages not exceeding seven dollars, is restricted, under the twenty-second and twenty-third sections of chapter 106 of the Revised Statutes, to cases in which the damages in the judgment reviewed from, did not exceed seven dollars.

THIS was a writ of error brought to reverse a judgment rendered by the county court, in favor of the defendant in error against the plaintiff in error, in an action for assault and battery.

It appeared by the record, that the action was commenced by the defendant in error, at the April term, 1839, and that, at the September term, 1840, he recovered a judgment against the plaintiff in error, for $15 damages, from which judgment the defendant in that action reviewed; and that, at the next term, the plaintiff in that action recovered a judgment for $6.50 damages, together with full costs, allowed by the court at $67.17—for which decision, allowing full costs, error was brought.

R. R. Thrall and *J. Collamer*, for plaintiff in error.

I. This action was brought under the former statute, before the present revision, and by the terms of the repeal, the cause is to be governed entirely by the old law, unless as to the forms of proceeding and trial. Rev. Stat. 510, §5.

II. Such would have been the law governing the case even if this section had not been inserted in the statute. *Admr. of Slade* v. *Heirs of Slade*, 10 Vt. R. 192.

III. By the law governing this case—the judiciary act of 1797, §97—the plaintiff below was not entitled to any more costs than his damages. Slade's Comp. Stat. 87, §97; *Parsons* v. *Young*, 2 Vt. R. 434; *Robinson* v. *Whitcher*, Ib. 563.

IV. The present statute is the same as the former, with the exception of leaving out what related to *appeal*, and should receive the same construction, especially where the review was successful in reducing damages. The revision was not intended to *alter* the law, and the old law is proper to aid a construction of the new. Rev. Stat. 473, §22 & 23.

S. Foot and *S. H. Hodges*, for defendant in error.

Although the Revised Statutes, 510, §5, provide that the repeal of the previous statutes shall not affect "any right accruing or accrued, or established, or any suit or proceeding had or commenced, in any civil case, before the time when said repeal shall take effect," yet the plaintiff in error had acquired no right upon the subject of costs before the judgment below, from which he took a review. This was at the September term, 1840, after the Revised Statutes went into operation. On the other hand, the same section requires the proceedings in every such case to be conformed to the provisions of the Revised Statutes. *Burnside* v. *Newton*, 1 Metcalf, 426.

The defendant in error is entitled to recover full costs under the 23d section of chapter 106 of the Revised Statutes, page 473. In reference to this question, the language of the Revised Statutes is widely different from that of the statute repealed, and is not subject to the construction put upon that statute by this court in *Parsons* v. *Young*, and *Robinson* v. *Whitcher*, 2 Vt. R. 434 & 563.

The opinion of the court was delivered by

ROYCE, J.—This writ of error is brought to reverse a judgment of the county court, in an action for assault and battery, in favor of the present defendant against the plaintiff in error. It appears, by the record, that the action was originally commenced in the county court; that at the September term, A. D. 1840, the plaintiff recovered judgment for fifteen dollars damages, from which judgment the defendant reviewed,—and that, at the next term, the plaintiff again recovered, but the damages awarded him were only six dollars and fifty cents. That was the final judgment in the action; and the question is, was the plaintiff entitled to recover full costs, or was he restricted in costs to the amount of damages finally recovered.

It is first insisted by the plaintiff in error, that this question should be governed by the statute of A. D. 1797, under which the suit was commenced. And if he is right in this, then it is already settled, by the cases of *Parsons* v. *Young*, and *Robinson* v. *Whitcher and wife*, 2 Vt. R. 434, and 563, that the plaintiff below, was only entitled to costs commen-

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surate with the damages finally recovered. We consider, however, that the question must be determined upon the Revised Statutes. Each review in the cause had vacated the previous judgment, so that the action was open and pending when these statutes commenced their operation. At that time, neither party had established a legal right to costs, nor had the defendant, as we think, any accruing right to a future exemption from costs. The old law would, indeed, regulate the taxation of costs whilst the suit was progressing under its operation, but we are not aware of any further effect that can properly be given to it.

The question must, therefore, depend upon the construction to be given to the 22d and 23d sections of chapter 106 of the Revised Statutes. The 22d section corresponds to the enacting clause of the 97th section of the old statute, and enacts, that in the action of assault and battery, and some others there specified, if the plaintiff shall not recover damages above the sum of seven dollars, he shall recover no more costs than damages. But there was a proviso to that section of the old statute, that "if the defendant appeal from 'such judgment, or review the cause, and final judgment 'shall be rendered for the appellee or reviewee, he shall re-'cover full costs." It was settled under that statute, by the cases already cited, that "*such judgment*" in the proviso, meant the judgment before described in the enacting clause, namely, a judgment not exceeding seven dollars in damages; and that the appeal and review, there spoken of, alike had reference to such a judgment and no other.

We have now to inquire whether the 23d section of the new statute corresponds, in its operation, to the old proviso just recited. The words, directly applicable to the present case, are—"If the defendant shall, in any such action, review the cause, ... the plaintiff shall recover full costs." On the part of the defendant in error, this is claimed as a general enactment, giving full costs to the plaintiff, in the actions specified, if the defendant shall, under any circumstances, review the cause, and ultimately fail in his defence; whilst the other party claims to treat it as a provision, intended to apply only when one of those actions may happen to be in the state or condition mentioned in the preceding section.

It is obvious that, as a general provision, this section was

not needed. Other statutes had given to the successful party in a suit, his legal costs, and that without regard to the number of reviews or new trials which might have intervened in the progress of the suit. Besides, the 106th chapter professes to be a law restricting cost. Its general scope and object, throughout, is to limit and abridge costs. In such a statute, we should scarcely expect to find an unqualified provision for giving costs,—a provision which, in most cases, as before remarked, would be altogether needless. This chapter was designed to modify and vary the operation of other statutes, which allowed costs generally to the party finally prevailing in a suit. The remainder of the section will be found to assist in giving a construction to the words under immediate consideration ;—" or, if the court shall, in 'either of said actions of trespass on the freehold, or for as-'sault and battery, be of opinion that the trespass was wil-'ful and malicious, and shall certify the same,"—the plaintiff shall recover full costs. This provision is expressed in terms equally unqualified and comprehensive as that concerning a review of the cause. It would literally apply to all " such actions," whatever amount of damages had been recovered. It is manifest, however, that no such general application could have been intended. As the law had imposed no restriction upon the plaintiff's right to recover his ordinary costs, except when his damages were not above seven dollars, the object and effect of the certificate are necessarily limited to such a case. The only purpose, then, of this provision, is to qualify and control the restriction upon costs imposed by the 22d section. And since the two provisions are blended together in one sentence, there is no good reason to doubt that they both originated in the same purpose. As the 23d section is, therefore, to be regarded in the nature of a proviso to the 22d, the reasoning of Prentiss, J. in *Robinson* v. *Whitcher and wife*, may be appealed to as conclusive of the present case.

The 23d section of the present act will thus stand as a substitute for the entire proviso in the old statute. The difference of phraseology, occasioned by the words " *in any such action* " inserted in the new section, does not necessarily create a difference in the sense ; because these words may be supplied by implication in the former proviso, when

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that is considered with a proper reference to the enacting clause. Moreover, as these words are found not to enlarge the provision relating to a certificate, it is not perceived why they should have a greater effect in this instance. The conclusion is, that the review, taken by the defendant below, being from a judgment for damages above the sum of seven dollars, was not such a review in the action, as the 23d section was designed to affect; and, therefore, as the plaintiff below finally recovered a sum in damages not exceeding seven dollars, that his right to tax costs in the suit became subject to the restrictive operation of the 22d section.

The judgment of the county court is reversed, and judgment for the defendant in error to recover costs equal to his damages.

DAVID KELLY *v.* JOSEPH C. DEXTER, DENNIS HORTON and EZRA ANDRUS.

Where property had been attached, and receipted to the officer, and was soon after, and before any demand for it had been made, sold by the officer at public auction, by the mutual consent of the officer, the attaching creditors, the debtors and receiptors, it was held that such sale was an implied rescinding of the contract evidenced by the receipt, notwithstanding the sale might have been made under the direction of the receiptors, and operated for their benefit, and the avails of the sale were paid into their hands.

THIS was an action of assumpsit founded on the following receipt:

"Received of D. Kelly, constable of Danby, the following 'described property, to wit, fifteen cows of the value of two 'hundred and forty dollars, also eight yearlings of the value 'of forty dollars, and seven calves at three dollars and fifty 'cents per head, which property we are to return on demand, 'or pay said Kelly the aforesaid sums, at our choice, when 'called for, after judgments are recovered on the demands on 'which said property is attached. We are to pay said Kelly 'for said property according to the above valuation, and if 'any man claims said property, Kelly is to pay us back, ac-'cording to the above valuation.

(Signed) J. C. DEXTER,
DENNIS HORTON,
'Danby, 23 February, 1836. EZRA ANDRUS."

The plaintiff averred, in his declaration, that the said property had, before the execution of said receipt, been taken by him, as constable of Danby, on divers writs of attachment at the suit of Thomas McDaniels, and T. & J. McDaniels, against Jared L. Hulett, and A. B. Hulett, in which suits judgments were rendered at the then following April and September terms of the Rutland county court, and that said property had been demanded, &c.

The defendants pleaded the general issue.

The plaintiff offered in evidence the foregoing receipt, together with the following endorsement thereon, signed by the defendants:

"Danby, 9 May, 1836. We hereby acknowledge that 'the within named property has been legally demanded 'of us."

The defendants offered evidence tending to show that, soon after the execution of the receipt, the property therein mentioned was, by the consent of the plaintiff and defendants, and the creditors and debtors, sold, by the plaintiff, at auction; that the defendants were present at the sale, which was made under their direction and for their benefit, and that the money received therefrom was paid to them. And the defendants proved that two of said cows attached were given up as not being the property of the debtors; and that a part of said cattle were claimed by the firm of S. & N. J. Smith, and were recovered by them in a suit against the plaintiff and others, and that, in consequence of said recovery, the sum of ———— was paid to S. & N. J. Smith, by T. McDaniels, the creditor in the execution against said J. L. Hulett. The defendants further proved that the said Dexter, one of the defendants, was the attorney of the said McDaniels.

The defendants also offered evidence tending to show that a part of the property, so receipted and sold, was sold to irresponsible persons, and that the avails had not been received, and probably could not be collected; but the court rejected this evidence as irrelevant—as the sale was in the presence, and under the direction, of the defendants—unless they could show that such property was sold to such persons against the consent of the defendants.

The defendants requested the court to charge the jury

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that it was necessary for the plaintiff to prove the rendition of the judgments as described in his declaration, and that writs of execution had been duly issued thereon, and placed in the hands of the officer attaching the property, within thirty days, or if placed in the hands of another officer, that it was necessary to prove that a demand of the property receipted had been duly made of the plaintiff.

The defendants also requested the court to charge, that the liability of the receiptors was discharged by the sale of the property, as above described.

But the court refused so to charge, and charged the jury that the plaintiff was entitled to recover on the evidence he had introduced as above described.

The defendants excepted.

—— ——, for the defendants.

1. It was incumbent on the plaintiff to prove the rendition of the judgments, and the issuing the executions, as set forth in his declaration.

2. The defendants were discharged from their receipt by the public sale of the property by the plaintiff. A new contract was thereby instituted; and, if liable at all, they were liable for the money they had received, and not on the receipt they had given.

3. The defendants ought not to be charged for property sold by the officer to irresponsible persons, unless they expressly assented thereto.

S. Foot, for plaintiff.

Proof, *aliunde*, of the rendition of the judgments described in the declaration, would have been a matter of supererogation, inasmuch as by the acknowledgment of the defendants on the back of the receipt, the property had been *legally* demanded of them.

The property being sold, under the direction, and in the presence, and with the consent, of the defendants, such sale could in no wise discharge them, even if made to irresponsible persons—the defendants not objecting to such sale.

The opinion of the court was delivered by

BENNETT, J. — The property, which the plaintiff, a con-

stable of Danby, had attached, on sundry writs against the Huletts, in favor of sundry persons, the defendants had receipted, and by the terms of the receipt they assumed to return the property to the officer, or pay for it, according to a given valuation, at their election, on demand, after judgments should have been obtained on the demands upon which the property had been attached. It further appears from the case that, soon after the receipt was executed, the officer sold the property at public auction, with the consent of the creditors, and debtors, and also the receiptors. The sale, as the case finds, was for the benefit of the receiptors, and under their direction; and the avails of the sale were paid into their hands.

The question, then, arises, what must be the effect of such a state of facts upon the contract evidenced by the receipt? The defendants stood as bailees of this property, without any beneficial interest. The possession of receiptors has been frequently called a *naked* possession. When the property is returnable on demand, the officer has the right, at any time, to take it from the possession of the receiptors by means of his original lien; and when thus taken, no action can be sustained upon the receipt.

When a statute is passed, inconsistent with a former one, upon the same subject, the latter is an implied repeal of the former. The same principle will well apply to contracts. It has been expressly adjudged that a contract is *impliedly rescinded* by a new and inconsistent agreement. *Taylor* v. *Hillary*, 1 Crompton, Mason & Roscoe's R. 741; also *Patmore* v. *Colburn*, Idem., 65. This principle must, at once, commend itself to every lawyer. The property, in the case before us, was sold by the officer, with the consent *of all in interest*; and it was thus put beyond the power of the defendants to return it. The arrangement is entirely incompatible with the idea that the property should be returned by the defendants in their discharge, as contemplated in their receipt. The sale being by the express consent of all concerned, a new liability is, by implication of law, imposed upon the defendants, from their receipt of the avails of the sale; and it being before any action had accrued upon the receipt, it must, in effect, be an *implied rescinding* of the contract. After such sale, I think it clear that the officer

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could not maintain trover for the property attached, against his receiptors. When, by the consent of all parties, and before the breach of an executory contract, it is put out of the power of the party to perform it, it is most reasonable that he should be discharged from its obligations.

If the defendants are to be charged upon the receipt, that must measure the extent of their liability, and not the amount of sales, whether greater or less. It can make no difference that the sale might have been under the direction of the defendants. It was none the less by the consent of all concerned. It being for their interest to have such sale made, cannot alter the case. If such course was adopted, as to excuse the receiptors from the responsibility of sustaining the property until it should be demanded on execution, it might, indeed, be for their benefit; but what then? It does not follow that they continue liable upon the receipt. Such sale might have been beneficial to the others. They, doubtless, judged it would be, or they would not have consented to it. It can make no difference with the question before us, that the moneys arising from the sale were paid into the hands of the defendants. They, doubtless, hold them in trust for some one. Whether the attaching creditors, or the officer in their behalf, could call them out, either at law or in chancery, or whether the attachments were, in effect, dissolved by the sale, so that the moneys are held by the defendants in trust for the original debtors, are questions not now before the court.

The decision of the question which we have considered will, of course, put an end to the present action; and there is no occasion to consider any other questions raised upon this bill of exceptions.

Judgment of the county court reversed.

H. & G. VAIL *v.* JOHN A. CONANT, Administrator of JOHN JACKSON.

The power of an attorney is confined to the prosecution of a suit and the incidents properly connected therewith; and does not extend to the compromising and discharging of his client's cause of action, without receiving his full claim.

THIS was an action of covenant broken, brought upon

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the covenant of seizin contained in a deed executed by John Jackson, the intestate, to the plaintiffs, on the 10th of December, 1829, conveying to the plaintiffs, for the consideration of $800, four hundred acres of land in Hydepark in this state.

The defendant pleaded *non est factum*, and accord and satisfaction. The pleas were traversed, and issue joined to the country.

Under the plea of accord and satisfaction, the defendant offered in evidence the following discharge, signed by the attorneys of record of the plaintiffs.

"Hydepark, January 12, 1839. Received, of John A. Conant, Esquire, administrator upon the estate of John Jackson, Esquire, deceased, five hundred dollars, by a draft on Boston, agreeably to said Conant's letter, dated January 8, 1839; which sum is in full for the adverse squatter claim, or possession, and a full *quietus* of the title of the following tracts or parcels of land lying, and being situate, in said Hydepark, and described as follows, to wit, two hundred acres, being the third division of Ransford Rose; also two hundred acres, being the third division of the original right of Giles Mumford, and being the same land conveyed by said Jackson, in his lifetime, deeded to Henry & George Vail of Troy, N. Y. for the consideration of eight hundred dollars; said deed dated on the 10th day of December, 1829, and acknowledged on the same day; said deed containing covenants of seizin and warrantee,—and upon which an action is now pending in favor of said Vails against said Conant, as administrator of said Jackson's estate; and which suit I hereby agree is fully settled and discharged, and the title quieted in said Vails; and which suit I hereby agree shall be discontinued and dismissed from the docket of said Rutland county court, on the first day of the coming term thereof, without costs to either party; and hereby direct the clerk of said court so to do. (Signed) JOSHUA SAWYER, Att'y to said Vails, plaintiffs in said action."

"I hereby agree that the above named suit shall be discontinued at the next term of the Rutland court.

16 January, 1839. S. FOOT, Att'y for Vails."

The defendant also offered in evidence a deposition of the said Joshua Sawyer, stating, in substance, that, in the

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year 1836, he was employed by the plaintiffs, to examine into the title to the said land, and prosecute, if necessary, for the enforcing of their supposed right thereto; that he commenced suits for that purpose (the said land being in two distinct lots) against one Flanders, who was in possession thereof, claiming title; in both which cases, after a trial in one of them, he deemed it expedient to enter nonsuits; that he, thereupon, consulted the plaintiffs in regard to further proceedings, and, having received from them a letter [a copy of which was offered in evidence subsequent to said deposition, and made part of the case] he commenced this suit, and employed the Hon. Solomon Foot to attend to the same; that, pending said suit, and under the discretionary clause in said letter, he held interviews with the "possessory claimants," and having ascertained that they would accept of $500, and release their "possessory title" to the plaintiffs, he consented to accept, and did accept, of the said $500 from the defendant, in satisfaction and discharge of the plaintiffs' claim on account of the said covenant of seizin; and that he considered this an advantageous arrangement for the plaintiffs—securing to them, as he believed, a title to the land, which, had they ratified and confirmed his doings, he testified would, in his opinion, have been worth to them twelve hundred dollars.

The defendant also offered in evidence the said letter of the plaintiffs to Sawyer, as follows.

"Troy, 18 July, 1837.

'J. Sawyer, Esq. Dear Sir: Your favor of the 29th June, 'came to hand; and in reply would remark, we wish our 'debt against Jackson to be kept secure, and put into a shape 'so that we shall realize the money, as soon as will be con-'sistent. As we are not familiar with your laws, we shall 'have to rely, in a measure, on your judgment and discre-'tion in managing the business. It appears to us, from 'your statement, we should not permit the covenant in the 'deed to expire, and, consequently, proceeding should be 'had, forthwith, to prevent this result. And should this be 'your impression, we wish you to take this step in time to 'secure the desired result. You will be so good as to inform 'us of the couse you think best to pursue in relation to this 'business. Yours respectfully, &c.

(Signed) H. & G. VAIL."

To the admission of the said discharge, and deposition and letter, the plaintiffs objected, and the court rejected the same; whereupon there was a verdict and judgment for the plaintiffs, and the defendant excepted.

Briggs and *June*, for defendants.

1. The evidence offered ought to have been submitted to the jury with instructions. The letter of the plaintiffs to Sawyer tended to prove an authority. The evidence should not have been rejected because it was insufficient to prove the whole issue, for other evidence might have been offered connected with the rejected evidence, to make out the defence. Whether the discharge was to be admitted or not, was a question depending upon the authority of Sawyer and Foot to make it; and evidence was offered tending to show that they had authority, which was a question of fact.

2. The discharge was sufficient evidence under the plea of accord and satisfaction. Sawyer and Foot were the attorneys of record for the plaintiffs, in a suit of a disputable character and uncertain damages. The question then arises —what authority and discretion have attorneys of record in adjusting, settling, discharging, or discontinuing suits? Without special authority, they have a right to refer suits, and enter into a rule of reference. *Holmes et al.* v. *Parker*, 7 Cranch, 436. In *Gailord* v. *Smart*, 6 Cowen, 386, it was held that an attorney, under a general power, might discontinue a suit. He may waive objections to evidence, make admissions in pleading, or by parol, and enter nonsuits or defaults, execute releases, &c. *Alton* v. *Gilmanton*, 2 N. H. R. 520. He may bind his client, as that a judgment shall be final, so that the client cannot appeal or review the action. *Pike* v. *Emerson*, 5 N. H. R.

An attorney is, in some degree, the agent, as well as lawyer, of the plaintiff. When execution is issued, he may give time to the defendant, and direct the sheriff to postpone a sale, advertise, &c. *Lynch et al.* v. *Commonwealth*, 16 S. & R. 368. It was decided in *Gorham* v. *Gale*, 7 Cowen, 739, that the plaintiff's attorney might give directions to the sheriff as to the manner of collecting the execution. An attorney may enter a *remittis damna*, as to part, and take judgment for the rest. 2 Ld. Ray. 1142; 1 Salk. 70. In

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the case of *Craig* v. *Turner*, 6 Johns. R. 53, it is stated, as a doubtful point, whether the attorney of record could not discharge the debt, without any satisfaction. The law necessarily confides to him a large discretion over the suit.

In this state, the practice has always been for the attorney of record, especially when his client resides at a distance, as in this case, to control the suit, and, without special authority, to compromise, settle, and discharge it, or compound with the debtor; and to exercise a discretion in claims, doubtful, either as to the ability of the debtor or the validity of the claim.

Policy requires that, where a defendant has acted in good faith, and paid the claim to the attorney, he should be protected; and if the attorney should be unfaithful, the loss should fall upon the person who has given credit to him and put it in his power to obtain money from the defendant.

It is said in *Lewis et al.* v. *Gamage*, 1 Pick. 347, that the attorney cannot discharge the debtor upon the payment of a less sum than the amount of the judgment. The question, however, in that case, was on a suit upon a bond for prison limits, and it appeared clearly that the discharge was obtained by fraud of the judgment debtor. There is no pretence of fraud or collusion in the present case. No debt was, in this case, fixed by a judgment. It was uncertain whether the plaintiff could make out his case, and whether the estate was solvent to pay any part of the claim, if established.

Smalley & Adams, for plaintiffs.

I. The deposition offered could not be received to vary the terms of the discharge, or to show with what intent it was executed. But, if admitted, it only proves that nothing was paid or intended to be paid to the plaintiffs, or received by them, in satisfaction of Jackson's covenant, but that which the deponent received from defendant, was received for the *adverse squatter claim*, under an agreement that Sawyer should purchase that claim, quiet the title to the land in the plaintiffs, and discontinue the suit. But, throughout the whole transaction, Sawyer professes to act for himself, and consequently, he alone is bound by his acts. He has agreed that the suit is settled, that the title is quieted, &c., but all for himself. He is not admissible to prove his authority as

against the plaintiffs, for that would be to exonerate himself. *Shiras* v. *Morris et al.* 8 Cow. R. 60; 4 Day. 458.

II. Assuming that Sawyer intended to bind the plaintiffs, it is clear, from the deposition and letter of the plaintiffs, referred to, that he had but a bare authority to prosecute the suit to judgment, without any special power to compromise or commute the demand. What is the power of an attorney? He is an officer of the court, with special and limited powers, well defined and established, by usage and authority; and it would be impolitic and dangerous to enlarge them, or leave them indefinite or doubtful. An attorney, by virtue of his general authority, cannot compromise a suit, nor can he, having a demand for collection, assign or compound it. *Penniman et al.* v. *Patchin*, 5 Vt. R. 352; *Carter* v. *Talcott* 10 Vt. R. 471; *Parot* v. *Wells et al.* 2 Vern. 127.

He cannot discharge his client's debt on receiving a part; and if he give a receipt when nothing is paid, it cannot affect his client. Paley, 221, 222. He cannot enter a retraxit, or discharge a defendant from execution, without payment. *Lewis* v. *Gamage*, 1 Pick. 347; *Kellogg* v. *Gilbert*, 10 Johns. R. 220, 229; *Gorham* v. *Gale*, 7 Cow. 739; *Jackson* v. *Bartlett*, 8 Johns. R. 281. Even a general agent cannot commute the payment of the debt or demand of his principal, by receiving some other thing in discharge of the debt. Paley, 221.

III. The evidence was inadmissible, because it only tended to prove a mere executory agreement; whereas, to be pertinent to the issue, it should have tended to prove the agreement between the defendant and plaintiffs to accept the satisfaction, and that such satisfaction was reasonable, perfect, certain and executed. For, an accord, before it can have any legal obligation or effect, must be completely executed. 1 Saunders, P. & E. 30, and 33, and authorities there cited.

IV. This action is founded on the deed; and the right of action was perfect, on the execution of the deed. The duty sought to be enforced by the action, must be avoided by matter of as high a nature as the deed. The receipt or acknowledgment, not being under seal, cannot be received as evidence, under the plea. 1 Swift, 669, 670, 673.

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The opinion of the court was delivered by

HEBARD, J.—Has an attorney, without special authority, power to compromise and settle his client's cause of action, without receiving the full amount of his claim? It has been insisted, in argument, that the attorney, in this case, had some more general powers conferred upon him, by the terms of his employment, than is incident to an attorney in ordinary cases;—and this is sought to be established by a letter from the plaintiffs to Joshua Sawyer, Esqr., one of the plaintiffs' attorneys. But it cannot fairly be established from the letter. Sawyer, before that, had been employed by the plaintiffs, and this letter was written in answer to one from Sawyer to them. In the letter, the plaintiffs say,—"We wish our debt against Jackson to be kept secure, and put in a shape that we shall realize the money, as soon as will be consistent. As we are not familiar with your laws, we shall have to rely, in a measure, upon your judgment and discretion, in managing the business." From the foregoing, we see that the plaintiffs declined giving their attorney any directions, only to pursue out the original purpose, in his judgment and discretion; and from that, also, we learn that the only purpose was the collection of the money. Having received a letter from their attorney, it would be very natural to make some reply, and we can hardly see what they could have said less than they did. As there is nothing contained in the letter which varies the powers and discretion of the attorney, it becomes important to inquire what are the powers and authority of an attorney, which are incident to the trusts and duties he has to perform.

An *attorney at law*, in Jacob's Law Dictionary, is defined to be "a person who takes upon himself the business of other men, by whom he is retained." The particular duties, and powers of an attorney, to bind his client by his acts, have been somewhat considered by courts. At one time it was doubted whether payment to an attorney, was payment to his principal; but this was decided as being incident to his powers, in 1 H. Black. R. 8. Since that, the power of attornies, as agents for their employers, has been variously considered. It, however, has been fully settled, that they have the control of the suit in which they are retained, so far, at least, as to bind their clients by all their agreements in relation to

all the circumstance of the trial. He may agree to a continuance; or he may admit a fact on trial, which, otherwise, the opposite party must prove. He may agree upon the form and time of trial; and it would seem by the authorities referred to in the case of *Gorham* v. *Gale*, 6 Cow. 739, that he may submit his client's cause to an arbitration, so as to bind his client. But it is held, in the same case, that an attorney cannot "enter a retraxit, or discharge a defendant from execution without payment." But it is urged that the attorney, in this case, did not intend to bind his principal; or if he so intended, that the writing is not so drawn as to have that effect. We think the paper, although inartificially drawn, is well enough to bind the plaintiffs, if he had that power. He describes the suit and the cause of action, and the parties, and signs his name as attorney, which is sufficient in a case where he has power to do so. But we think he has not that power. The current of authorities is against it. In the case of *Bell* v. *Mason*, 10 Vt. R. 509, the judge, in delivering the opinion of the court, says, that it may be doubted whether an attorney, in any case, can borrow money to prosecute an action, and pledge the credit of the client, and render him responsible." If the attorney could not borrow money to prosecute his client's suit in a case of necessity, to save the suit from being lost, and bind his client for the payment of it, it is most clear that the powers of the attorney are confined to the prosecution or defence of the suit, and that he has no power to compromise and agree upon terms and conditions of settlement.

In *Penniman* v. *Patchin*, 5 Vt. R. 352, a similar doctrine is held. In that case, the power of the attorney to make any disposition of a demand, is denied.

The case of *Gailord* v. *Smart*, 6 Cow. 385, cited by defendant's counsel, clearly recognizes the doctrine that an attorney cannot give a release to a cause of action, although he may enter a discontinuance,—because that does not discharge the cause of action, The plaintiff may commence a new suit in that case.

Judgment affirmed.

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ROWLAND P. COOLEY *v.* EDWARD H. AIKEN.

Cooley v. Aiken.

The court will not dismiss a cause for want of jurisdiction of the county court,—when no such motion was made there, and the *ad damnum* is over one hundred dollars, and it does not appear that the plaintiff, in laying his damages, improperly attempted to give jurisdiction to that court.

The selectmen of a town refused to receive the disclosure of a person assessed for money at interest, and he afterwards agreed to appear before them and make his disclosure, and neglected so to do, and there was no subsequent refusal or neglet on their part, to receive such disclosure. *Held* that his agreement and neglect was a waiver of any claim on account of the refusal.

THIS was an action on the case against the defendant, who was one of the selectmen of the town of Benson, for refusing to administer to the plaintiff the oath provided by the statute, in the case of persons aggrieved by reason of the assessment of money on hand, debts due, &c., by the listers, and for refusing to receive and return to the town clerk the plaintiff's disclosure, under the statute, by reason of which he was unjustly taxed, &c.

Plea, not guilty, and trial by jury.

On the trial in the county court, it was agreed by the parties, that at the annual March meeting of the town of Benson in 1836, Daniel Crofoot, Dan Higgins, and the defendant, were duly appointed and sworn as selectmen in and for said town of Benson, for the year then next ensuing, and that, at the same meeting, Seth Wood, Isaac Dickinson, and Hubbard N. Griswold, were duly elected and sworn as listers; that said listers made out, and signed, a list of property by them assessed, including money on hand, debts due, &c., with the names of the persons assessed, in due form; and, on the 18th day of June, 1836, lodged the same with the town clerk of Benson; that the name of the plaintiff was placed in said assessment, with the sum of five thousand dollars thereto annexed, for moneys on hand, and debts due him, &c.; that, in the grand list of Benson for 1836, the sum of three hundred dollars, being six per cent. on the said sum of five thousand dollars, was included in the list set to the name of the plaintiff, and included in the respective balances set to his name for state, highway, county, town, and other taxes; that school, town, highway, and state taxes were duly assessed to the plaintiff on said three hundred dollars, amount-

ing, in the whole, to sixty one dollars and fifty cents, and that said Cooley was compelled to pay, and did pay, the same, previous to the 20th day of June, A. D. 1837, and before the commencement of this suit, to the several collectors of the said taxes, who held tax bills and warrants, duly made out, for the collection of the same.

The plaintiff then offered evidence tending to show, that on the 29th day of July, A. D. 1836, he went to the store of the defendant, in said Benson, and there found the defendant and the said Dan Higgins, (being two of the selectmen of said town) together, and offered to make his disclosure, under the statute, in relation to his money on hand and debts due, &c.; and then wrote a paper stating, substantially, that on the first day of April then last past, the amount of his, the plaintiff's, money on hand, or obligations for money or any other property then due, or to become due or payable, at any after day, which he deemed good and collectable, was not over and above what was then due and owing from him; and that he then presented it to the defendant, and requested him to administer the oath provided by law, and to receive his disclosure; that the defendant refused so to do, and said that he would as soon take his disclosure without oath as with; that in the course of the conversation, the defendant contended that he had a right to inquire what particular persons owed the plaintiff, and how much; and what particular persons he owed, and how much; that the plaintiff pressed the subject upon the defendant, and said Higgins, and appeared anxious to close the business, but both declined; and that plaintiff then left the store, saying that he had done all that he was bound to do, and that he should not take any more trouble about it.

The defendant then offered evidence tending to show that, in the course of the conversation between the parties, which followed the application of the plaintiff at the store of the defendant, a subsequent meeting of the selectmen was proposed by the defendant and Higgins; that the defendant was then about going on a journey, and left said town the same afternoon for that purpose; and that, when the plaintiff requested said Aiken to administer the oath, the plaintiff had not finished writing out his disclosure.

The defendant then offered testimony tending to show

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that on the 11th day of August 1836, a meeting of the three selectmen was held at the town clerk's office in said Benson, for the purpose of taking and certifying disclosures, under the statute, and that said Higgins, one of the selectmen, gave notice, early in the afternoon of that day, that this meeting would be held at that time and place, in the presence and hearing of the plaintiff; that the plaintiff said that he had done all that he was bound to do, and that he would not go before said Aiken at any rate, for he, Aiken, had misused or abused him; that the plaintiff did not attend this meeting of the selectmen, and that his dwelling house was but about ten rods distant from the place of said meeting; that after the meeting was over, two of the selectmen, to wit, the said Higgins and Daniel Crofoot, went to the plaintiff's house to see him, but could not find him, and that Higgins went home; that Crofoot went again to the plaintiff's house, and found him at home, and that, in the course of the conversation upon the subject, the plaintiff said that he had applied once to Aiken and Higgins, and they had refused him, and he was not bound to pursue them; that he would not go before Aiken again, for he, Aiken, had abused him, but that he, the plaintiff, was willing to go before said Crofoot and Higgins, and transact the business with them, at any time and place, they might appoint; and that Crofoot proposed, and the plaintiff agreed upon, the next Tuesday evening at the plaintiff's house for that purpose; that Crofoot then wrote a line to Higgins, informing him of this appointment; and that on the said Tuesday evening Crofoot went into the village of Benson, and was told that the plaintiff had left, on a journey to Massachusetts or Connecticut on the Monday morning before, and that Crofoot did not go to the plaintiff's house for that reason; that Higgins did not attend on said Tuesday evening; and that, after the commencement of this suit, the plaintiff told said Crofoot that he could not have agreed to a subsequent meeting on said Tuesday evening, because he had been making preparations to leave the state, on a journey, on the Monday before, and did leave accordingly. The defendant also gave evidence tending to prove that previous to the said Tuesday evening, and after the 11th August, the plaintiff said he did not like the course the selectmen were taking with him,—

that he should be too quick for them, and if they wanted to see him, they would have to come to Connecticut or Massachusetts. The admission of this testimony, as to what took place on the 11th August and after, was objected to by the plaintiff, but the objection was overruled by the court, and the testimony was admitted.

The court charged the jury, that if this last testimony, as to what took place on the 11th August, and after, was believed, the defendant was not liable; and that if the plaintiff did agree to meet the selectmen on the Tuesday evening as testified, and neglected and refused so to attend, it released or discharged any right of action that might have previously accrued to the plaintiff, or that was relied upon by the plaintiff in support of the issue on his part. The jury returned a verdict for the defendant.

To the said decision and charge of the court, the plaintiff excepted.

L. C. Kellogg, for plaintiff.

I. The testimony offered by the plaintiff shows a complete cause of action. It has been decided by this court that the duties of the selectmen, in reference to disclosures under the listing act of 1825, (Rev. Stat., p. 543,) are of a ministerial character. *Kellogg* v. *Higgins et al.*, 11 Vt. R. 240. Consequently, the refusal of the selectmen to administer to the plaintiff the oath provided by law, in such cases, and to receive his disclosure, at the time he applied to them for that purpose, gave the plaintiff a right of action against those of the selectmen so neglecting or refusing to do. The testimony shows that all that was necessary to be done on the part of the plaintiff, in order to perfect that right, was done.

II. The testimony offered by the defendant, as to what took place after the 29th July, (when the plaintiff made his application to the selectmen, and was refused,) ought not to have been admitted, for the plaintiff's right of action was complete on that day, and this testimony does not show a discharge of that right. The appointment made with Crofoot was nugatory, since it was made with one of the selectmen only. It could have no binding effect on the plaintiff, so far as this action is concerned, because it was made without consideration, and does not amount to a waiver of any right

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which had previously accrued to him. In fact, a waiver of such right is expressly guarded against in the language attributed to the plaintiff on this occasion. The cause of action, once accrued, must have been discharged, if at all, by some act either of the plaintiff or the defendant. No such act of the latter is pretended on the part of the defence. Can the mere assent of the plaintiff to the proposition of Crofoot be construed to have the effect of such an act on his part, when it was not even valid and binding on Crofoot?

III. If this testimony ought not to have been admitted, by parity of reasoning, the charge of the court was erroneous.

E. N. Briggs, for defendant.

I. We contend that the county court had not jurisdiction in this case, upon the plaintiff's declaration. The question of jurisdiction can be taken at any stage of the proceeding in a suit, and if a want of jurisdiction appear, it is the duty of the court to dismiss the suit.

The injury sustained by the plaintiff, as stated in the declaration, and shown on the trial, amounted to $61.50, and it is not alleged, nor is any testimony offered to show, that the plaintiff sustained any other injury. The rule of damages is, we believe, as stated by the judge who tried the case, this sum and the interest thereon. The action of trespass *de bonis asportatis* would imply that there might be more damages, beyond the value of the property, than in the action of trespass on the case, where the damages seem to be settled, or nearly so, by the declaration itself. The case of *Kittridge* v. *Rollins*, 12 Vt. R. 541, if good law, must settle the question. A justice has jurisdiction in this case. *Kellogg* v. *Aiken*, 11 Vt. R. 243.

II. Did the county court err in admitting testimony as to what took place on the 11th August and after? We contend that the testimony was correctly admitted. The testimony previously admitted was conflicting as to the fact, whether plaintiff had made and offered his disclosure to defendant Defendant had also given evidence tending to show that a subsequent meeting of the selectmen would be held for the purpose of receiving disclosures, and that defendant was about going a journey, and had not time to do the business then.

The selectmen were not bound to attend to the business of receiving and certifying a disclosure at any time, but had a right to consult their own as well as other's convenience for such a purpose, and might properly fix upon a time and place, and give notice thereof to the persons interested, for transacting the business. The plaintiff had no reason to complain of defendant's acts, if plaintiff had an opportunity to make his disclosure and refused to avail himself of it.

It is contended, by the plaintiff, that a right of action accrued upon the defendant's refusing to certify his disclosure. If defendant did refuse to certify plaintiff's disclosure, and had no reasonable excuse for such refusal, still, if plaintiff had an opportunity, and might have had his disclosure certified subsequently, it cannot be said that the injury complained of by plaintiffs, accrued in consequence of the act of defendant.

III. Was the charge of the court correct? The court charged that, if the testimony was believed, the defendant was entitled to recover. The testimony was full, that there was a meeting of the selectmen for the express purpose of receiving disclosures — that plaintiff had notice of this meeting — that a subsequent meeting was agreed upon by plaintiff and the selectmen, which meeting plaintiff agreed to attend and make his disclosure, and that he failed to do so.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The question, whether the county court had jurisdiction, is presented now for the first time, the same not having been raised in the county court. The only ground on which the court can, with propriety, dismiss a cause for want of jurisdiction, in a case where the damages are laid within the jurisdiction of the county court, is when it appears that the party has fraudulently attempted to give jurisdiction, by laying his damages above one hundred dollars for the sole purpose of giving jurisdiction. It was on this ground that the case of *Kittridge* v. *Rollins*, 12 Vt. R. 541, was decided; and though I was opposed to the decision in that case, on the ground that, in trespass *de bonis asportatis* the value of the goods are never the criterion of damages, yet it is to be considered that the law, as established in that case, is to govern in all cases, when the county court believe that the party has wrongfully attempted to give them juris-

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diction. In a subsequent case of *Spafford* v. *Richardson*, where the plaintiff declared on a contract for one hundred bushels of corn, to be delivered at a day certain, and no evidence was given to show that the value of the corn was, or could be, over eighty-three dollars, it was determined that the county court erred in dismissing the cause for want of jurisdiction. As this question was not raised at the county court, we cannot determine that the plaintiff attempted improperly to give jurisdiction to the county court.

It appears from the exceptions that, on the 29th of July, 1836, the plaintiff appeared before the defendant and Mr. Higgins, two of the selectmen of the town of Benson, and offered to make his disclosure under the statute, in relation to his money on hand and debts due, &c., he having been previously assessed by the listers in a sum which he thought was too much. It was the duty of the selectmen to receive this disclosure; their duties, in this respect, being purely ministerial, according to the decision in the case of *Kellogg* v. *Aiken*, 11 Vt. R. 243. If nothing further had taken place, the plaintiff, when he was compelled to pay taxes on the sums assessed against him, would have had an undoubted right of action against the selectmen. No action accrued to him from this refusal, until he was thus compelled to pay. Hence if the selectmen had, afterwards, offered to take his disclosure, or if he agreed again to appear before them for that purpose, no injury would have arisen from their first refusal, unless they afterwards neglected their duty in this particular.

It appears that, on the evening of the 11th of August, 1836, the plaintiff did agree with Mr. Crofoot, the other selectman, to meet him and Mr. Higgins on the following Tuesday evening for the purpose of attending to the business of his disclosure. This was equivalent to a waiver of any advantage he might have had, or any claim on the selectmen for their previous refusal to take his disclosure, unless the meeting failed on account of their neglect. The failure to attend this meeting was on the part of the plaintiff; and, indeed, it was in evidence that he purposely avoided it. It is true the two selectmen did not come together on the evening proposed, though one of them appeared there. As the plaintiff had left the state, it would have been wholly useless

for the other selectmen to have met. We think, therefore, the county court took a correct view of the law, as applicable to the case, both in admitting the testimony and in their charge to the jury.

The judgment of the county court is affirmed.

KATY BULL, Administratrix of Nehemiah Bull, appellant, *v.* BARBARA NICHOLS, appellee.

Although, by the laws in force in 1793, at the decease of a testator, the devisees could have compelled a division of the estate held under the will, only in the supreme court, yet it was competent for the legislature to change the tribunal for making the partition; and when made, it must be according to the laws then in force.

It is no valid objection to the jurisdiction of the court of probate, under the act of 1821, in making partition of lands held jointly by several devisees, that some of them had alienated their interest before the commission was applied for.

Though an assignee of some of the devisees, may, while holding the lands in common, have put betterments thereon, yet the commissioners to divide it, must appraise it at its then value, and make the division accordingly.

The appellant from a decree of the probate court, having filed exceptions to which the appellee has demurred, must be confined to such exceptions.

THIS was an appeal from a decree of the court of probate, accepting the return of commissioners appointed to divide the estate of Stephen Nichols, deceased.

It appears that, on the first day of April, 1840, the court of probate, for the district of Rutland, appointed Ira Edmonds and Caleb Randall, commissioners, with authority as follows:—

"To appraise all the real estate whereof Stephen Nichols, 'late of Mount Tabor, in said district, died seized and pos-'sessed, in said state, each piece and parcel by itself, at the 'present true value thereof, in lawful money. When you 'have perfected your inventory, you are faithfully and impar-'tially to divide, and make partition of, the estate therein 'appraised, among the children or heirs of said deceased, in 'the manner and form following, that is to say—To Elcy 'Wing, wife of Benjamin Wing, Drusilla, wife of John Car-

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'penter, Catharine, wife of William Carpenter, Patty, wife of 'Joseph Conger, and Barbara Nichols, their respective heirs 'or assigns, each one-fifth part of a certain portion of land, 'devised to said heirs, by the aforesaid Stephen Nichols, 'consisting of about seventy acres, situate in Mount Tabor.

"You will take notice that Gideon S. Tabor is appointed agent for Elcy Wing, Drusilla Carpenter, Catharine Carpen-'ter, and Patty Conger, their heirs and assigns. When you 'go about your work, let all parties concerned have notice."

The commissioners, on the 20th of April, 1840, made return to the court of probate, that they had "appraised all 'the real estate whereof Stephen Nichols, late of Mount 'Tabor, deceased, died seized, within this state, consisting of 'seventy acres of land, and the buildings situate on the same, 'at the sum of $875, the one fifth of which sum, being '$175, is the share of each of the heirs respectively."

The commissioners then proceeded to say, that they had set out and divided said estate to, and among, the said heirs as follows,—"To the said Barbara Nichols, a certain tract of 'land, situated on the east end of said farm, [here follows 'the description,] containing twelve acres, which we have 'appraised at the sum of $175, which is her full share of said 'estate: To Elcy Wing, fourteen acres and a half, appraised 'at $175; to Drusilla Carpenter, fourteen acres and a half, 'appraised at $175; to Catharine Carpenter, fourteen acres 'and a half, appraised at $175; to Patty Conger, fourteen 'acres and a half, appraised at $175. To have and to hold," &c.

It does not appear from the return, that notice was given to the "parties concerned."

From the decree of the court of probate, accepting the said return, Katy Bull, administratrix of Nehemiah Bull, assignee of the four last named of the said heirs, appealed.

Upon the entering of the appeal in this court, the appellant filed the following objections.

"The appellant objects to the report of the said committee and its acceptance by the probate court, for the following reasons:

1. Because the said Stephen Nichols, during his life, to wit: on the 25th day of September, 1787, made and published his last will and testament, in which, among other

things, was the following bequest. "I give and bequeath to 'my beloved wife, Anne, during her natural life, all my lands, 'tenements, goods, chattels, and whatever estate or interest, 'either real or personal, that I shall die seized of, in posses- 'sion or reversion, with all the profits arising from the same. 'After that, I will and ordain that the same be equally shared 'among my children, which I do give to them, their heirs and assigns forever;"—as by the said will, now on file in the probate office for the district of Rutland, will appear. After which, to wit: in 1793, the said Stephen Nichols died seized of the said seventy acres of land, so divided by the said committee, and leaving the said Anne, his wife, and five children, to wit: the said Elcy, Drusilla, Catharine, Patty, and Barbara Nichols. The appellant avers that, afterwards, to wit: in 1808, Nehemiah Bull purchased the shares of the said Elcy, Drusilla, Catharine and Patty, in said land, and entered upon, and took possession of, the same, and continued in the occupancy thereof, until the day of his death, to wit: until 1825. After the death of the said Nehemiah, the appellant, as his administratrix, continued in possession of the land, and has so continued until the present day.

The appellant further says that the said Anne died in January, A. D. 1840.

The appellant, thereupon, insists that the probate court has no power to order a division of said estate.

2. The appellant also objects to the said report, because the committee appraised the said land at its present value, with the buildings thereon. The appellant avers that, when the said land came into the possession of the said Nehemiah, it was not worth more than one fourth its present value; that it has been thus increased in value by the buildings erected, and the clearings made, by the said Nehemiah, and the appellant.

The appellant insists that the committee should have set off to the said Barbara, but one-fifth of the value of said land, appraised without the buildings and improvements.

KATY BULL, By E. F. Hodges, her Attorney."

To these objections the appellee demurred.

S. H. Hodges and *E. F. Hodges*, for appellant.

I. The probate court should, of right, take no jurisdiction over the estate in question.

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1. The pleadings disclose a case of great hardship to the appellant, against which she can have no remedy at common law, or under the statute of partition. In such cases the parties are remitted to a court of chancery, as alone competent to do them justice. *Arms* v. *Lyman*, 5 Pick. R. 210; *Conant* v. *Smith*, 1 Aik. R. 67; *Brown* v. *Turner*, Ib. 350.

2. When the estate in remainder in the premises, vested in the devisees, at the death of the testator, in 1793, they could have been compelled to divide them in the supreme court, and there only. Of this right they have never been deprived, but it has been carefully saved on the repeal of the then existing statute. Stat. of 1787, pp. 57 & 120; 2 Tolman's Ed. of Statutes, 414.

3. The control of the probate court over lands devised, must evidently be terminated at some period. We contend this is, when any of the devisees alien their shares or take possession of them; since they are no longer in the hands of the executor, as estate of the testator. *Pond* v. *Pond*, 13 Mass. R. 413; *Cook* v. *Davenport*, 17 do. 345; *Stearns* v. *Stearns*, 16 do. 167; Stat. Mass. 1817, ch. 190, § 24, cited in Big. Dig. 449, Joint Tenants, c. 7.

4. The statute gives no authority to the probate courts to interfere where all the devisees, save one, have alienated; but only where a devisee holds lands in common with any other devisee or devisees. Slade's Comp. 350, § 83.

II. The records of the probate court (a court of limited jurisdiction) should show that all the proceedings have been correct. There are defects apparent upon the face of the proceedings in this instance, which render them void. 2 Mass. R. 213; 4 do. 121; 11 do. 507; 14 do. 22; 17 do. 81.

1. The committee have made no just division, and are not directed to, by the court, but have set off the land according to its present value, not according to its value when the estate vested; and have paid no regard to the rights of the claimants. *Webster* v. *Merriam*, 9 Conn. R. 225.

2. Notice was not given to the husbands of the devisees, nor to their assignee, neither of the order of division by the court, nor of the division by the committee. *In re Robinson*, 1 D. Chip. R. 357; *Chase* v. *Hathaway*, 14 Mass. R. 222; *Shumway* v. *Shumway*, 2 Vt. R. 339; *Bouton* v. *Neilson*, 3 Johns. R. 474; *Rathbun* v. *Miller*, 6 do. 281;

Harper v. *Carr*, 7 T. R. 270. See the express directions of the probate court in the warrant.

3. Admitting that the probate court could take notice of the assignment, and had done so, the return does not describe the portion set off to the assignee, and is therefore void; for though transfers by private individuals may have their words of description aided by evidence *aliunde*, this will not be allowed in official conveyances. *Harrington* v. *Barton*, 11 Vt. R. 31; Slade's Comp. 351, §86; do. 349, §79; 2 Cruise's Dig. 469, 485; 1 Inst. 164, b.; *Miller* v. *Miller*, 16 Pick. R. 215. Proceedings in partition imply a warranty, and the return should furnish either party with a remedy, should he be evicted of his property by an older title. Com. Dig. Parc. C. B., Guaranty A; Co. Lit. 173, b; Lit. §272; Saville R. 113; 2 Cruise Dig. 470; 2 Black. Com. 300; Bac. Ab. Warranty, E.

4. We insist, however, that neither the probate court nor its committee, could take notice of the assignment. It was their duty, in dividing the land, to set out property to each devisee, by metes and bounds. The obvious design of the statute was, that this proceeding, which is at the expense of all the devisees, should not be used for the benefit of one alone, but should ascertain the respective portions of all. *Arms* v. *Lyman*, 5 Pick. R. 210; *Pond* v. *Pond*, 13 Mass. R. 417.

Clark & Pierpont, for appellee.

It was in the power of the probate court to make the division of the real estate, devised by the will of Stephen Nichols, after the decease of his wife, Anne, among the children of the said Stephen, to whom he devised the land. Slade's Comp. 351, §83.

The committee properly appraised the land, at its present value, including the improvements made thereon. If one tenant has a claim upon a co-tenant for repairs, it may be collected, like other debts; but he cannot, by making repairs, purchase the interest of the co-tenant. In this case, however, Nehemiah Bull, or his administratrix, cannot have any claim upon Barbara Nichols, for improvements made on the land, for he acquired no right to the possession of it by the conveyance from Elcy, Drusilla, Catharine and Patty, during the

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life of Anne. If he was in possession, he must have been in under the tenant for life, or as a trespasser. If as a trespasser, he has no claim on any one; and the remainderman is not accountable for improvements made by tenant for life.

The opinion of the court was delivered by

BENNETT, J.—This case comes up by an appeal from a decree of the probate court, accepting the return of the commissioners, dividing the estate of Stephen Nichols among the devisees. This division having been made before the Revised Statutes went into operation, the questions must be decided under the law then in force.

It is objected to the jurisdiction of the probate court, that, by the laws in force at the death of the testator, in 1793, the devisees could only have compelled a division in the supreme court. If this were so, still the legislature might change the tribunal for making the partition, as the right would not be thereby affected, but simply the mode of seeking the remedy.

It is also said that the jurisdiction of the probate court, under the act of 1821, was defeated by the alienation of four of the devisees, of their shares, to Nehemiah Bull, the intestate, and the husband of the appellant. This act provides that the probate court may, upon the application of any devisee, order a division of any real estate, held by such devisee in common with any other devisee; and the Revised Statutes provide, expressly, that the alienation of one of the devisees shall not affect the jurisdiction of the probate court. The statute of 1821 has long received a practical construction in the probate courts; and they have, as we understand, proceeded to cause divisions to be made among heirs, and devisees, though, at the time of the division, some third person had become interested in the estate, by purchase. Under these divisions in the probate office, there is a large amount of real estate held in severalty; and we should be slow to disturb such divisions, unless constrained to it. In *Pond* v. *Pond et al.* 13 Mass. R. 413, it is true, under a statute similar to ours of 1821, it was held the probate court had no jurisdiction to make partition, after there had been an alienation, made before the commission had been prayed out.

If, however, the commission had been issued before the alienation, the same court will proceed, notwithstanding such

alienation. *Cook* v. *Davenport*, 17 Mass. R. 347. The case of *Pond* v. *Pond* does not seem to have any very good reasons to support it; and we are not disposed to depart from the practical construction which our statute has received. The course has been to make the partition directly among the heirs or devisees, and leave the shares thus set out, to the effect of the alienation. This relieves the court of probate from determining questions that may arise from the conveyances or assignments of any of the heirs or devisees—which is much dwelt upon, in the case of *Pond* v. *Pond*, as a reason why the probate court should not have jurisdiction.

It is also said that the commissioners ought not to have appraised the property at its *then* value, including the betterments put upon it by Nehemiah Bull. But this was right. If Bull made betterments upon the land, while it was undivided, this gives him no *lein* upon the land itself for his indemnity. He must be satisfied with the remedy which the law furnishes in other like cases.

These are all the exceptions now properly before this court. The appellant has, in argument, insisted upon the want of proper notice; and also to the insufficiency of the commissioners' return, in not setting out by metes and bounds the several shares set out to the four devisees, from whom the appellant's intestate, Nehemiah Bull, purchased. But the appellant must be confined to her written objections, or exceptions, to the report, to which the appellee has demurred; and the cause must stand or fall upon them. But as the appellant's intestate had purchased in all the shares, except the one set to Barbara Nichols, which is set out by metes and bounds, no practical inconvenience will result, in this case, from a want of a more certain description. We affirm the decree of the court of probate, with costs.

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HIRAM K. HUNT *v.* THURMAN & MARTIN.

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H. contracted with T. & M. to deliver, at a certain place, from 300 to 1000 cords of wood, before a certain time specified in the contract. *Held*, that the delivery by H. of not less than 300 nor more than 1000 cords, at divers times, between the date of the contract, and the time specified therein, vested the property of the wood, thus delivered, in T. &. M., so as to make its destruction their loss.

The place of delivery, in such case, may be varied, by parol agreement, without otherwise affecting the contract.

THIS was an action of book account. Judgment to account was rendered, and auditors were appointed.

The auditors reported that the parties had appeared before them, and the plaintiff presented an account against the defendant amounting to $1551.24, which they set forth in their report, and which embraced 762½ cords of wood. They also reported that the defendants presented an account against the plaintiff amounting to $1221.81, which was not objected to.

They further reported that the plaintiff presented the following memorandum of an agreement:

"Whitehall, Oct. 9, 1839.

"Mr. H. K. Hunt is to deliver on Gibbs & Byram's dock, next winter, from 300 to 1000 cords of wood—one half or more to be hemlock, and the other basswood and white pine and hard wood, to be delivered before the first of July, 1840, at two dollars per cord.

(Signed) THURMAN & MARTIN,
H. K. HUNT."

The auditors reported, further, as follows:

"On the trial before the auditors, it appeared that the defendants contracted with the plaintiff for the wood in question, as per written contract, with a view of selling the same to the steam-boat company, and did so sell the same. To prevent any loss in the measurement of the wood, the defendants wished to have it measured by the agents of the company, that it might be received by the company at their measure. It did not appear that the plaintiff ever agreedto any such arrangement. But it appeared that, about the last of April, the plaintiff applied to the defendants to measure the wood, when they told him that Capt. Boardman, who was the agent for the steam-boat company, would measure

it, and the plaintiff then applied to Boardman a number of times, to measure the wood. Boardman measured the wood on the 3d day of July, 1840, but did not measure it on the last of April or first of May, when applied to by the plaintiff, the water then being so high as to render it inconvenient.

It also appeared that, after the written agreement was made, it was ascertained that the steam-boat did not stop at Byram's dock, and the defendants desired the plaintiff not to deliver any of the wood at that dock. It also appeared that Gibbs' wharf was sufficient to hold but a small part of the wood, and that Gibbs would not consent to have it used for that purpose; that the wood was piled immediately south of Gibbs' wharf, upon the lake shore, at about high water mark, and as near to the dock as they could get it; that this was ground on which it was customary to pile wood designed for market, and on which Gibbs directed the plaintiff to pile the wood in question; that Thurman, one of the defendants, was there twice previous to the middle of February, at which time a large portion of the wood had been drawn; and that he examined the wood, and found no fault with the place where, or the manner in which, it was piled. On the 11th day of May, 1840, one of Hunt's hands called on the defendants to know where to pile wood, and they directed him to call on Gibbs, and pile it where he should direct. It appeared that in May, after some of the wood had been carried off by the water, the plaintiff called on the defendants to know where to pile a part of the wood not then delivered, and that Martin, one of the defendants, told him to have it measured in the boat, and then throw it over the pile on the shore, and if it went off he would lose it.

It further appeared that, during the spring, the water in the lake rose to an uncommon height, and about 142¼ cords of the wood in question were carried off; and that it would have been safe had not the water risen considerably higher than usual.

The wood in question was delivered by the plaintiff, as before stated, in pursuance of the aforesaid *written* contract dated Oct. 9, 1839. Most of it was delivered by individuals with whom the plaintiffs had made contract for that purpose; and they had procured the wood to be measured from them to the plaintiff; but otherwise it was not measured by the

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plaintiff, nor any one else, till it was measured by Captain Boardman, on the 3d of July, 1840, excepting what was measured by Gibbs and what was delivered at Whitehall, which was previous to that time.

If, from the foregoing facts, the court should be of opinion that the plaintiff ought to recover, we find due him the sum of two hundred and sixty-seven dollars and eighty-nine cents. But, on the contrary, should the court be of opinion that the title to the wood remained in the plaintiff till it was measured off to the defendants, and did not vest in the defendants as it was delivered and piled as aforesaid, then we report a balance in favor of the defendants against the plaintiff of the sum of thirty-nine dollars and ninety-one cents."

Upon the coming in of this report, the defendants excepted to the same, "for that the auditors have allowed to the 'plaintiff for a large quantity of wood which was piled by 'him upon the beach near Gibbs' dock, in the winter of '1839–40, with an intention, on his part, to deliver it to the 'defendants upon a written contract, which, by said contract, 'was to have been delivered on Byram & Gibbs' dock, by 'the 1st of July, 1840, but which was carried off by the 'freshet, and lost, about the 11th of May, 1840, and before 'it had been measured, or in any way delivered by the 'plaintiff to the defendants."

The county court overruled the exceptions, and rendered judgment for the plaintiff; — to which decision the defendants excepted.

R. R. Thrall and *J. Collamer*, for defendants.

There are, at common law, three, and, in this state, four different forms of action by vendor against vendee of goods. 1. Special assumpsit on the contract to purchase. 2. An action for goods bargained and sold. 3. An action for goods sold and delivered. 4. An action on book for the goods sold and delivered. These are not concurrent actions, except the two last; which are so. They are actions adapted to the different state of circumstances which may exist between vendor and vendee.

The action on book, for personal property, can only be sustained when the article has been actually *delivered*; that is, only when the property therein, has entirely vested in the

vendee, and the vendor has no further possession, dominion, or control of the same. That makes the action of book, as to personal property, concurrent with assumpsit for goods sold and delivered, and with that only. This was settled in this state, in the case of *Reed* v. *Barlow*, 1 Aik. 145, and has never since been shaken, or even qualified, but often confirmed.

The *delivery* must be at the proper time and place; and if anything yet remains to be done in relation to the property, by the vendor, or by both parties, it is not delivered, does not vest, and is at the risk of the vendor. If the goods are yet to be measured or weighed they are not delivered. *Zagury* v. *Furnell*, 2 Camp. 240; 11 East R. 210; 5 Taunt. 617; 2 M. & Sel. 397; 1 Swift's Dig. 277, 379; 2 Kent's Com. 390; Chit. on Con. 299; 15 Johns. R. 349.

If the vendor so retains the goods in his possession as to retain his lien for pay therefor, he has not *delivered* the goods, and cannot sustain an action for goods sold and delivered. *Baldy* v. *Parker*, 2 Barn. & Cres. 37; *Carter* v. *Toussaint*, 5 Barn. & Ald. 855; 7 C. L. R. 280; 3 Stark. Ev. 1619, n.

No act of the plaintiff could have vested the property in the defendants, without their consent until the 30th day of June—the last day named in the contract for the delivery. 1 Swift's Dig. 293. In this case the wood was not *delivered*, as it remained, unmeasured, until the 3d day of July. Until that time it was the property of the plaintiff. The defendants could not have justified the taking it, or any part of it. The plaintiff was under no obligation to deliver more than 300 cords, and had until July to do that. How much, and what part, he would conclude to deliver, the defendants could not tell, and therefore, they could take none.

The plaintiff held possession so that he had a lien for his pay, and had the defendants become bankrupt before July, their assignee could not have held the wood, nor was it so the defendants', until July, that their creditors could have attached it.

II. The action for goods *bargained and sold*, lies, when there is a sufficient contract of sale to vest the title to the property of the goods in the vendee, and the right to the pay in the vendor, but there has been no delivery. 3 Stark. Ev. 1624; *Smith* v. *Chance*, 2 B. & Ald. 758. Many such cases

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might be named; and it would seem, this action may be sustained, when the vendor has fully performed on his part, but the vendee has failed, even if the vendor has resold the goods.

In this case, if the defendants were bound to receive and pay for the wood before July (of which there may be much doubt) if the defendants had neglected or refused, on reasonable application, to attend to the measure of the wood or to receive it, the plaintiff might have had the same measured; and then, if the defendants would not receive the same, he might have sustained his action for goods bargained and sold. But he did not do so. He made no such request. The defendants made no such neglect; and the plaintiffs made no such measure or tender.

III. The other form of action, by vendor against vendee, is a special action, for neglecting or refusing to receive the goods according to the contract, the vendor having fully performed on his part. In such case no property passes. There is no delivery, the vendor keeps the goods and recovers only the damages or loss, for the defendants' not performing. With this the action of book has no concurrence.

In the present case, if there was, by the contract, a duty on the defendants, to receive the delivery of this wood before July, and if the neglect of Boardman, to whom they referred to measure the wood, had not a sufficient excuse, and if, thereby, the plaintiff was deprived of his right of delivery, that did not make that a *delivery*, so as to sustain this suit. It only showed a breach of the defendants' contract to receive the wood, and would only sustain an action therefor. But it is insisted—1. That good excuse for not measuring the wood, then, fully appears. 2. If it did not, that did not prevent the plaintiff from measuring and delivering the wood. 3. That he made no measure or delivery until July, and, of course, the property remained his, at the time of the loss. 4. That even if no excuse for not attending to the measure before the loss, appears, yet that did not make a delivery before, and, therefore, *this* action cannot be sustained for the wood that was lost while it was the plaintiff's property.

E. N. Briggs, for plaintiff.

This is an executory contract, in writing, signed by the

parties. It is for the delivery of property upon which something is to be done, to put it in a state in which it was contracted to be sold; and should be construed so as to give effect to the intentions of the parties.

1. At what time was the wood to be delivered, according to this contract? It was to be delivered "next winter," and delivered before the first of July, 1840. Taking these two expressions together, they obviously mean, that the wood should be delivered, from time to time, during the winter, the usual time of procuring this article, but extending the time to, guard against accidents, to the 1st of July, 1840.

2. As to the place of delivery. The contract says that the wood is to be delivered on Gibbs & Byram's dock. This is to receive a construction from the nature of the transaction, and the acts of the parties. It was not the expectation of the parties that the wood would be delivered literally on the dock, but at the place of delivering such articles for storage near the dock. It is found, by the auditors, that the dock had not sufficient capacity to hold the wood; that the defendants altered the contract, or requested that no wood should be delivered at Byram's dock, and that the wood was piled adjoining to the dock, in the place used for the piling of wood and lumber. This may be considered as a part of the landing, or dock. The auditor also finds that Thurman, one of the defendants, after a large portion of the wood had been drawn, examined it and made no objections to the place or manner of piling. This was a virtual construction, of the contract on his part. The defendants received the wood *upon the contract at this place.*

It is an established rule, that where goods are sold, if nothing remains to be done on the part of the seller, as between him and the buyer, before the article is to be delivered, the property has passed. 6 East. 614; 4 Mass. R. 661. The measuring of the wood was not essential to the full delivery. The quantity was to be ascertained by the parties in some way, but the plaintiff could recover for no more than he delivered. The wood had been measured as delivered, by the persons delivering; and no question is now raised as to the quantity.

There was a sufficient delivery of the property to pass the title, and it might have been held upon an attachment against

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defendants. But, in many cases where the delivery and change of possession might not be good, as to third persons, or attaching creditors, it would be good as between the parties, and make the risk of the property in the purchaser.

Where goods are contracted for, to be sent by some conveyance to the purchaser, a delivery to the carrier, ship, or other conveyance, is a delivery of the goods to the purchaser, and they are at the risk of the purchaser or consignee. *Whiting et al.* v. *Farrand*, 1 Conn. 60.

The vendor may have the right of stopping *in transitu*. Kent, in his Com. 2 vol. p. 496, says—When everything is done by the seller, even as to a parcel of the quantity sold, to put the goods in a deliverable state, the property, and consequently the risk, pass to the buyer. In many cases no delivery is necessary to complete a sale. When the terms of sale are agreed upon, and the bargain is struck, and every thing which the seller has to do with the goods is completed, the contract of sale becomes absolute, without actual payment or delivery, and the property, and the risk of accident vest in the buyer.

The opinion of the court was delivered by

HEBARD, J.—From the contract, under which the wood in question was delivered, it appears that the quantity to be delivered, except as limited by a minimum and maximum, is not expressed;—that the *time* of delivery, is all the time between the date of the contract and the first day of July after,—and the *place* of delivery, on Gibbs & Byram's dock; and the kind and quality of the wood is expressed in the same general terms. The question is, whether there was such a delivery of the wood that was carried off by the flood, as to vest the property in the defendants, and entitle the plaintiff to recover the pay for it? If the plaintiff has done every thing agreeably to the terms of the contract, there can be no doubt of this, unless the parties have, in some way, varied or enlarged the contract, subsequent to its inception; and this is not shown to have been done, so far as the simple fact of a delivery is concerned.

It appears from the auditors' report, that the *place* of delivery was varied, by mutual consent of the parties, as to a part of the wood. This is different from a contract to de-

liver a certain specified amount, or value, of specific articles, in payment of an antecedent debt. In that case, the whole amount due must be delivered on the farthest day named. In this case, two things are to be noticed; first, the quantity of wood is such as to render it impossible that the whole should be delivered in one day; the other is, that the phraseology of the contract is such as to imply that it was to be delivered on different days,—and the ultimate quantity was not specified—only the largest and smallest quantities. The expression in the contract is not, on or before a certain day, nor on a certain day,—but it is to be delivered before the first day of July. Whatever wood was delivered agreeably to the contract, became the property of the defendants; and the plaintiff had no right, afterwards, to take it away.

The defendants, to some degree, assented to what was done. One of them was present when some of the wood was delivered, and assented to the place of depositing it.

The case of *Zagury* v. *Furnell et al.* 2 Camp. 240, is cited by defendants to sustain their objection, for want of a delivery. The governing principles in the two cases, are not similar. The question of delivery is a question of fact, and must, of necessity, be governed, in a great measure, by the nature of the transaction, and the nature and circumstances of the property to be delivered. This wood, by the written contract, was to be delivered on Gibbs & Byram's dock; but the parties, afterwards, varied this part of the contract, by parol. In other respects, it is evident they intended to be governed by the written contract; and the auditors have found the fact, that the wood was delivered according to that contract.

In the case of the goat skins, in the case referred to, there was no delivery, and nothing that the parties talked about as a delivery. They talked about a sale of the skins; but the case finds that the usage of trade was to count them over, and the duty of the seller to do so, to see whether the bales contained the number specified in the contract; and before any of the skins had been counted, the whole were destroyed by fire, at the wharf where they lay, at the time of the sale. The buyer had never received them. They had not been moved, after the sale, and were not placed where they were, by any consent or agreement of the buyer; nor was

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the *place* of delivery any part of the contract of sale. In all these particulars, it varies from the present case. The wood had been delivered at the stipulated place, within the time agreed upon, subject to the defendants' convenience; and would have been measured but for the neglect of the defendants.

The plaintiff applied to the defendants to measure the wood, and they told him that Boardman would measure it; and he called upon Boardman, a number of times, but he neglected to do it, till after the wood was carried off.

We, therefore, think that the plaintiff had done all that he could do, and all he was bound to do, to fulfil his contract.

The judgment of the county court is affirmed.

SILAS GIDDINGS and WIFE, ROSWELL BATES, DAVID BATES, LOUIS BATES, HARRIS BATES, AMY BATES, and HOPEY BATES *v.* DENNIS SMITH and JONATHAN RUSSELL.

The probate of a will made in 1781, it not appearing that the heirs, &c., were notified, is good. The judge of probate had jurisdiction, and his proceedings are presumed to have been regular after such a lapse of time.

A will made in 1774, and proved in 1781, may be read at this time, without further proof, when both parties claim under the same devise.

In such a will, a devise to E. H. and the lawful heirs of her body, gave her an estate tail.

Such an estate is not barred by the deed of herself and husband, acknowledged in 1797, before a justice of the peace.

Her issue, after her death, are not estopped from claiming the estate, in consequence of any covenant of warranty contained in the deed. The statute of conveyances did not enable a feme tenant in tail, to convey by a deed of herself and her husband.

A vendue deed, when the proceedings were not recorded in pursuance of the statute, does not convey any title.

A suit commenced by the children of the feme is not barred by the statute of limitations, when the suit was brought within fifteen years after the death of both husband and wife.

EJECTMENT for seventy-five acres of land in Rutland. Plea, not guilty. Issue to the court.

On the trial in the county court, it appeared that, on the 9th day of June, 1774, Daniel Harris, of said Rutland, by his last will and testament duly executed, devised to his

daughter, Elizabeth Harris, "*and to the lawful heirs of her body*," the premises in question; that said will was approved by Joseph Bowker, judge of probate for the district of Rutland, on the 2d day of May, 1781, whose certificate of the administration of the oath to the witnesses of the will, was made by him as a justice of the peace; that subsequent to the making of the will, the said Elizabeth Harris intermarried with Christopher Bates, and that after the marriage, and after children born, the issue of such marriage, to wit, on the 1st day of January, 1797, the said Christopher and Elizabeth executed a deed of said premises, with a covenant of warranty, to Issachar Reed, which deed was acknowledged both by the said Christopher and Elizabeth, *before a justice of the peace*, on the 1st of April, 1797; and that there was a regular chain of conveyances of said premises from said Reed to the defendants.

It appeared that the wife of the said Giddings, plaintiff, together with the plaintiffs, Roswell, David, Louis, Harris, Amy and Hopey Bates, were children of the said Elizabeth, and claimed the premises in question as an estate tail, under the will of Daniel Harris.

In addition to the claim of title through the conveyance to Reed, the defendants, also, claimed under a vendue deed, dated the 20th of November, 1801, from the collector of the town of Rutland to the said Reed, executed upon a sale of the premises, under a tax, granted by the legislature, at its October session, 1797. Parol evidence was offered to show, that said collector had once had a warrant from the state treasurer, to collect the tax on which said premises were sold, and had lost the same. The defendants offered a receipt from the town clerk of Rutland, dated in July, 1798, specifying that a duly attested copy of the notification of a vendue for the sale of land under said tax, and of the sales made in pursuance thereof, was received by him from the collector—which was accompanied by parol evidence that no record of the proceedings of the collector, specified in said receipt, could be found.

The court decided that the said vendue deed, and the evidence offered in relation thereto, were insufficient to give the defendants a title, and rejected the same.

The defendants objected to the admission of the will of

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Daniel Harris, for the reason that it was not properly executed and probated.

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It appeared that Christopher Bates and Elizabeth, his wife, had died less than fifteen years before the bringing of this suit.

The court decided that, under this showing, the plaintiffs were entitled to recover; to which decision, and the previous decisions of the court, the defendants excepted.

E. L. Ormsbee, for defendant.

The doctrine of entails is wholly at variance with our institutions, the spirit of our laws, and the express language of our constitution; and it is the duty of the courts to give a liberal and beneficial construction to all general laws, bearing upon the subject, by which the proposed end of this wise provision in the organic law can be best attained. In adopting the common law, the provision in the constitution must be taken, as clearly indicating that estates like the one created in this will, should be considered as conditional fees, subject to alienation on the birth of issue.

Vt. Stat. Papers, 20, 70, 73, 79, 241, 287; Laws of New York, vol. 1, p. 44; 4 Kent's Com. 14; Vt. St. P. 190, 195, 434, 288, 450; 2 Black. Com. 45, 110, n., 287; Crabb's Hist. of Eng. Law, 13, 177; 1 Rep. 131; 6 Rep. 49; 3 Ch. Ca. 17, 20, 36, 48; 1 Vt. R. 6, 164, 161; Cro. Car. 230; 2 Mod. 287; Salk. 229; 1 Willes' R. 73; 8 Mass. R. 37; Lingard's Hist. of Eng. vol. 3. p. 215; 4. J. Burr. 25, 79; 1 Plow. 235; Brougham's Hist. Sketches, vol. 1, p. 180; Rev. Stat. p. 7; Vt. St. P. 250; 2 Black. Com. 111, 355, 117; N. Chip. R. 122; Slade's Stat. 167, 189, 84; 4 Kent's Com. 13, 166; 8 Vt. R. 291; Tolman's Stat. 210, 212; Kirby's R. 110, 176; 3 Days. R. 332; 1 Bro. C. C. 325; 4 Kent's Com. 12; 1 Inst. 19, a; Plowden, 239, 247, 223; Viner's Ab. Estate F., pl. 2, 3; 1 Rolle's Ab. 841, D. pl. 1, 2; 7 R. 125; 4 Kent's Com. 15, n. b; Slade's Stat. 52, 167.

The statute *de donis* is inapplicable to our local situation and circumstances, and repugnant to the provisions of our constitution. It has never been, expressly, by act of the legislature, or by judicial decision, adopted as part of our system of laws.

On general principles, to regulate entails so as to prevent perpetuities by allowing alienation by simple deed of record, (a mode equally advantageous, as it regards both perpetuation and publicity or constructive notice, and far more efficient, under our system of registration, as it respects actual notice to all concerned,) is far preferable to obtaining the same end by the highly artificial mode of fine and recovery—a mode unadapted to our habits, expensive, and, until since the pendency of this suit, unknown in our practice. Alienation is more in analogy with the short and simple provisions of the civil laws,—the system best adapted to a civilized people.

Fine and recovery is merely a mode of conveyance. As such, not only has it never been adopted in this state, but it has been expressly excluded by statute. Slade's Comp., p. 187, §8, p. 171, §12. But if it is held that fine and recovery is an action, then it is taken away by the statute regulating the mode of prosecuting for the recovery of real estate. Slade's Comp. p. 84, §88.

If the above views are not adopted, the defendants insist that the alienation by Bates and his wife, worked a forfeiture of their estate, and from that period, the statute of limitations would run. From the time the vendue deed was taken, and, *a fortiori*, from the time that I. Reed, claiming under that, gave a warrantee deed to Zerah Mead, who took possession under it, it must be considered that an adverse title was set up, and from that period the statute of limitations must have commenced running. Where possession was taken and continued, many things should be presumed in favor of so ancient a vendue, especially in favor of quieting so ancient a possession.

Parol evidence to show that the collector had once had a warrant and had lost the same, and parol evidence of its contents were admissible. It appears that a copy of the collector's proceedings was left with the town clerk, for record, and though no record can now be found, it is fairly presumable that the proceedings were recorded and that the record is lost.

The probate of the will was defective, because,

1. The proof was taken before a justice of the peace, and not in the probate court; and

2. Because the will was probated, without any notice to

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the parties interested. 1 D. Chip. R. 357; 14 Mass. R. 222; 2 Vt. R. 339; 3 Johns. R. 474; 6 Johns. R. 281; 9 T. R. 270.

R. Pierpont and *J. Collamer* argued for plaintiffs.

The opinion of the court was delivered by

Williams, Ch. J.—The importance of the question in this case appears from the fact that it has been three times before the court, and the case is, probably, the first and only one in which it has been the subject either of discussion or adjudication in our judicial tribunals. Several points have been made in the argument, and it may be proper to notice them, as the court have deliberated upon them, and are prepared to express their opinion.

An objection was made to the will of Daniel Harris as not being properly executed, or proved. The objection to the execution of the will has not been much insisted on; and it seems to be unobjectionable. The will was executed by the testator in the presence of three witnesses, who signed their names as witnesses, in the presence of the testator and also in the presence of each other.

At the time this will was proved, no directions were given in the statute, in what manner the court of probate should proceed.

The executor was required to present it for probate, under a penalty, and jurisdiction over the subject-matter was given to the court of probate. The judge, who was, also, a justice of the peace, swore the witnesses before him as justice, from a doubt then entertained whether, as judge of probate, he could administer an oath; and, having considered the testimony, he approved the will and it was recorded. If there was any apparent irregularity in his proceedings, which, however, we do not perceive, we should think that, at this distance of time, the regularity of the previous proceedings of the court, should be presumed, according to the decisions in *Collard* v. *Crane*, Brayton, 18; and *Judge of Probate* v. *Fillmore*, 1 D. Chip. 420.

An old will, even when it appeared not to be proved and recorded, as the law directed, was allowed to be read as evidence, as an ancient deed, although actual possession did

not follow and accompany the will. *Jackson* v. *Laraway*, 3 Johns. Cas. 283. And in the case of *Jackson* v. *Blanshan*, 3 Johns. R. 292, a will, when thirty years had elapsed since its execution, was allowed to be read as evidence when the possession had been held under it for twenty-seven years. Both parties claim under the devisee, in this case, and the possession was under her, and, of course, under the will, until within fifteen years previous to the commencement of this suit. We see, therefore, no objection whatever to the reception of the will as evidence, whether duly proved or not; and moreover we have no doubt it was executed and proved according to the law then existing.

The next question is, what estate was given by the will to Elizabeth Harris, the mother of the present plaintiffs, who, it appears, intermarried with Christopher Bates, and with him, in 1797, executed the deed to Issachar Reed, under which the defendants are in possession. The will was dated June 9, 1774, and approved May 2, 1781. The devise is in the following words: "I give to my well beloved daughter, Elizabeth Harris, and to the lawful heirs of her body, one hundred acres of land," &c. The land in controversy is part of the land devised to her. The intention of the testator, at the time he made the will, is to be learned, and when ascertained to be carried into effect. This intention must be the one he had at the time he made the will. For although it has been said, that a will must be made to speak from the testator's death, and be looked on, not only as his last will, but as his last words; yet it cannot be made to speak any thing different, or more than what the testator said when he made it. If it does, the law would make the will and not the testator; and an intention, other and different than his, and other and different from what he expressed, would be carried into effect.

The technical effect of the words of a will is presumed to be intended, unless the contrary appears from the will. The instances are numerous, where words of purchase are made words of descent. The words, issue—son—children, are words of purchase, yet they have been made words of descent in a will. The word here is a word of descent, and yet in Mandeville's case, Co. Litt. 266, it was a word of purchase. In the case before us, there is nothing to show that

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the testator did not intend the words made use of should be considered in their technical meaning. At the time this will was made, the testator resided in a territory within the jurisdiction of the state of New-York. He describes himself "I, Daniel Harris, of Rutland, in the province of Charlotte, in New-York." The language made use of in the devise is technical and artificial—"to Elizabeth Harris, and the lawful heirs of her body." These words were early adjudged to create an estate tail. *Clark* v. *Day*, Cro. Eliz. 313. If the testator had reference to the law of the state of New-York, these estates tail had existed, ever since it had been an English colony, and these words had acquired a precise and definite meaning, and created an estate tail with all its incidents. If we were permitted to suppose that the testator was an emigrant from the New England states, surrounded with a New England population, and made use of the words as there understood, the words had the same meaning there; for in Massachusetts, Connecticut, Rhode Island and New Hampshire, estates tail were known, and these words were considered as creating such an estate. In the year 1636 the colony of New Plymouth enacted that all the lands heretofore *entailed*, and that shall be *entailed*, hereafter, shall descend and enure, as by the law of England the same ought to do. In Massachusetts, "the doctrine of estates tail was adopted by the collection of principles in 1641, called 'Fundamentals,' and has operated from that time." In Connecticut it has been decided that a devise to a man and the heirs of his body lawfully begotten, gives an estate tail. This was under a will made in 1739, and was decided in the year 1780. *Manwaring* v. *Tabor*, 1 Root, 79. The same was decided under a will made in 1783. *Allen & Wife* v. *Bunce*, 1 Root, 96, and a case there cited, of *Kimberly* v. *Hale*, under a will made in 1727. *Wells et ux.* v. *Orcutt*, Kir. 118, and *Chappel* v. *Brewster*, Kir. 175, are to the same effect. The doctrine of entailments was modified, however, in some measure in Connecticut. They consider that estates given in tail, vest an estate in tail in the first donee, which he could not dispose of, or incumber, for a longer term than his own life, and an estate in fee simple absolute in his issue, either because they thought such a modification better suited their institutions and circumstances, or because they considered it

as the common law, before the decisions in England made them conditional fees, or because the natural import of the words intended such an estate.

The doctrine of conditional fees, as it was considered in England before the statute *de donis*, and which called for, and caused the enactment of that statute, was expressly repudiated in Connecticut, in the case of *Allen & wife* v. *Bunce*, before mentioned, and rejected in the other cases there mentioned, and does not appear ever to have been recognized in New England or New York. The policy which induced the courts of justice to give them a construction inconsistent with their original intention, does not appear ever to have prevailed in this country, except in the state of South Carolina. This view of the case is, we apprehend, abundantly sufficient to shew what was meant, and what the testator meant, at the time he made his will, by the terms "lawful heirs of her body."

We are, then, to inquire whether there was any change in the government, policy, or laws existing at the death of the testator, to prevent his intention from being fulfilled, and which would avoid the devise and prevent the devisee from taking the estate intended to be given her; for I apprehend the statute could not make a will for the devisor, and give the land, directly contrary to his will as expressed at the time of its execution.

At what time the testator deceased does not appear; but probably it was a short time before the will was approved, at which time there had been a change of jurisdiction over the territory now comprised in the state of Vermont, and in which the land devised was situated; and nothing can be found in the constitution or laws of the state of Vermont which, as we can discover, should prevent this devise from taking effect. In 1777, Vermont established a separate government, and adopted a constitution, and from that time was, *de jure*, and *de facto*, an independent, sovereign state. In this constitution, they recognize entails as existing, and do not abolish them, but require that "a *future* legislature shall regulate entails in such a manner as to prevent perpetuities." A similar provision has been introduced in every constitution since made, and is now an article in the existing constitution of this state. The legislature have passed no acts upon the

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subject of entails, until the revision in 1839, nor made any regulations about them. Probably they have considered that entails, as existing, did not create any perpetuity, inasmuch as, by the law of England, New-York, and Massachusetts, before they were entirely abolished by statute, they could be barred by a common recovery; and in Connecticut their effect had been so declared as to give the first donee only an estate for life, and to his heirs a fee simple. The first attempt to regulate entails by statute, was in the 59th chapter of the Revised Statutes, (passed in 1839,) section 1.

After the first constitution was adopted, at the session of the legislature holden in 1778, they had recourse to Connecticut for their laws, and from the journal of the legislature we learn they passed several acts as the said acts stand in the *Connecticut law book*. They voted that the fees of the court of probate be "*three times as much as established in the Connecticut law*. In February, 1779, they enacted "that *common law*, as it is generally practiced and understood, in the New England States, be, and is hereby established as the common law of this state." This statute was in force at the time the testator deceased. It is not necessary to examine the provisions of the statute particularly, as we do not consider them as making any alteration in the nature of the estate in question. Common law, as *practiced* and *understood*, probably meant, as considered or altered by statute or by judicial constructions, and as it was adapted to our local circumstances and usages, generally adopted. It is most probable they had reference to the common law as understood and established by usage, or the determination of the courts in Connecticut, as that appears to be the state to which the legislature had particular reference in passing laws.

It may not be necessary to pursue the history of our laws on this subject further, as these were all the laws existing when the devise took effect; and it appears to us, very clearly, that, as estates tail were then known and recognized in New England, and in most of the states of the Union, and in the constitution of this state, no alteration was made by our law to prevent the devise to Elizabeth Harris from taking effect according to the will of the testator.

But if we follow the history of our law from that time to

the present, we find, as it appears to us, that such estates have always been known in this state to the present day. In June, 1782, the legislature passed an act, wherein they recite that "the inhabitants of this state have been habituated 'to conform their manners to English law, and hold their 'real estate by English tenure," and enact, "that so much of 'the common law of England as is not repugnant to the 'constitution, or any act of the legislature, be adopted, and 'shall be, and *continue* to be, law within this state;" and that such "statute laws and parts of laws of the kingdom of 'England, passed before October, A. D. 1760, for the alteration and explanation of the common law, &c., shall be, and 'continue to be, law within this state." This law was continued to the revision made in 1797, with the alteration only, that, in the laws passed in 1787, adopting the statute laws of England, they omit the word *alteration*, and adopt only such as were made for the *explanation* of the common law. In the year 1792, in the reports and dissertations published by our eminent citizen, Judge Chipman, he speaks of the whole chapter of entails as abridged, perhaps expunged; and this distinguished and able judge, and lawyer, and statesman, who has done so much to give stability, and form, and substance to our laws and civil and political institutions, and who, in that way, gave a higher character to our state than any other man whatever, in connection with another eminent lawyer, were appointed a committee to revise our laws, and in 1797 they reported a system of laws, which was adopted and published by the legislature, and which is probably equal, if not superior, to any body of statute laws which have ever been passed in this country. In one of the statutes reported by them, it is enacted, that no deed or other conveyance, in fee simple, *fee tail*, or for term of life, or any lease for more than one year, &c., shall be good and effectual, &c., unless acknowledged and recorded. Slade's Stat. 167. And, in another statute in relation to joint tenancies, &c., they say, all gifts, grants, feoffments, devises, and other conveyances, &c., whether for years, for life, in *tail*, or in fee, shall be taken, &c. Slade's Stat. 177. By thus enumerating the several estates, for life, in fee simple, and fee tail, which existed in England, they directly recognized their existence here, and that they might continue to exist thereafter. In

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the revision of our statutes, which took place in 1839, chap. 59, page 309, the legislature, for the first time, attempt to regulate the subject of entails, probably satisfied with the manner in which they existed, and also satisfied that if any legislature should attempt to create perpetuities, the constitutional inhibition would prevent it. In this statute they adopt the law on this subject, as it was always understood in Connecticut, and declare that the first donee in tail shall be seized thereof for his natural life only, and the remainder shall pass, in fee simple, absolute, to the person who, on the death of the first donee, grantee, or devisee, would succeed to the estate, by virtue of the gift, grant, conveyance, or devise.

In view of the law, as it existed when the testator made his will, and as it has continued to exist, with the alterations and explanations, we have no doubt, but that, by the words of the will, Elizabeth Harris took an estate tail, *secundam formam doni.*

The question then arises whether, by any act of Elizabeth Harris, the estate has been barred or aliened, so as to prevent it from vesting in the heirs of her body, the present plaintiffs.

By the law, as existing before the statute *de donis*, and while conditional estates were recognized, if a feme tenant in tail, had taken husband, and had issue, and the husband and wife had aliened, in fee, by deed, yet the issue might have a *formedon in descender*, for the alienation was not lawful; but otherwise if it had been by fine. Co. Litt. 19, a. By the law of New York, until 1782, and by the law of Massachusetts, until 1786, and by the law as existing in England, an estate tail would not be barred by a deed, but only by a common recovery. In Connecticut, the first donee could not bar, or convey, the estate, except during his or her life. In Rhode Island it could be barred by a deed, executed and acknowledged agreeably to the directions of their statute. No such statute has ever been passed in this state; and if in New York it was necessary to pass the statute of 1782, and in Massachusetts to pass the statute of 1786, and in Rhode Island their statute, for the purpose of enabling the tenant in tail, by deed, to convey the estate, the same necessity exists in this state; and, for want of such statute, the

estates must remain as they were in those states before the passing of those statutes.

It is, however, urged that the statute of conveyancing, which was passed in 1787, and which was in operation at the time Christopher Bates and his wife, the devisee under the will, executed the deed to Issachar Reed, authorized them to bar the issue as well as the reversion. The statute was as follows: "All deeds or conveyances of any houses or lands 'within this state, signed, sealed, and delivered by the par-'ties granting the same, *having good and lawful authority*, 'attested, acknowledged, and recorded, &c. shall be valid 'to pass the same, without any other act or ceremony in the 'law whatsoever—want of livery of seizin or attornment of the 'possessors, notwithstanding." By a subsequent section, it is further provided that no real estate whereof a feme covert is or shall be seized, shall henceforth pass by deed of herself and her baron, without a previous acknowledgment made by her, apart from her husband, before a counsellor, a judge of the supreme court, or of the county court. Haswell's Stat. 32. This statute only authorized those to deed and convey, who had good and lawful authority so to do, and dispensed with livery of seizin and attornment. This act does not determine who has the right, nor give any right where none existed before, but leaves that to be determined by the laws then in force. Elizabeth Bates had no authority, by *common law*, nor by *statute, to bar* the issue in tail, or the reversion, by a deed of herself or baron, or even to convey her own estate in fee simple, except by a deed executed according to the direction given in the statute; and in the dissertation upon this statute, by judge Chipman, it is neither asserted nor intimated, that the statute was to have any effect similar to the one now demanded for it; and, indeed, it is difficult to see how the words, "*having good and lawful authority*," should be construed as giving authority, when none before existed. In Massachusetts, by their provincial statute, Wil. 3, c. 7, it was provided, that such as have *good and lawful authority* to convey houses or lands, may deed, by deed acknowledged, &c. Under this statute it would seem as though it might be argued with some degree of plausibility, that all who could convey, by any species of conveyance, could, by virtue of that statute,

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convey by deed. It was, however, said by Chief Justice Parsons, when an attempt was made to account for the origin of an usage for a feme covert to convey by a deed of herself and baron, under this statute, that "one objection to 'this reasoning is, that, according to the practical construc-'tion of the statute, it proves too much; *for a tenant in tail* '*can convey by common recovery, yet it was never supposed* '*that, under this statute, he can convey so as to bar his issue* '*or those in remainder or reversion.*" *Fowler* v. *Shearer*, 7 Mass. 14. We can see nothing, therefore, in this statute which would justify us in drawing the conclusion that an estate tail of a feme covert, whether as known in England, or in Connecticut, or in this state, can, or ever could be, barred by a deed of the husband and wife.

But there is a still further objection to the deed executed by Bates and his wife to Reed, presented at this argument for the first time, which, in our view, is entirely fatal to it, as conveying the estate of Elizabeth Bates. The statute of 1797 was the first which authorised a *justice of the peace* to take the acknowledgment of a deed of a feme covert. This statute was suspended and did not go into operation until September, 1798. The deed in question purports to have been dated in January, 1797, and to be acknowledged before Moses Watkins, justice of the peace, in April, 1797, who took the separate examination of the wife. We have already noticed that, by the act of 1787, in force both at the date, and acknowledgment of this deed, no estate of a feme covert could, thereafter, pass, by deed of herself and her baron, without a previous acknowledgment made by her, apart from her husband, before a counsellor or judge of the supreme, or county court; and it was further enacted that a certificate of such acknowledgment should be entered on the deed, by the magistrate, and that every alienation, &c. not acknowledged, together with a certificate of such acknowledgment, was declared to be *ipso facto* void. This deed was not so aknowledged, as Mr. Watkins had no authority to take the acknowledgment as justice of the peace, and was, as to her, *ipso facto* void. The attempt of the legislature to give force and efficacy, by an act of the legislature, to a deed, executed by Job & Theoda Wood, husband and wife, and acknowleged as the law directs, by

her, separate and apart from her husband, but where the magistrate omitted to make the certificate, and was dead at the time of passing the act, was pointedly condemned by the council of censors, disregarded by the judicial tribunals, and repealed by a subsequent legislature. Acts of 1812, chap. 17, and of 1814, chap. 8.

The remaining questions, in this case, are few and of easy solution. These plaintiffs are not estopped by the covenant of warranty, contained in the deed of Christopher Bates and his wife. The deed was void, as to her, as we have already remarked. The wife is never bound by the covenants contained in a deed, except in the case of a fine; and the issue of a tenant, in tail, is not estopped by any deed, with covenants, executed by the ancestor. The plaintiffs claim under the will of their grandfather.

The vendue deed was correctly rejected (as the proceedings were not recorded) on the authority of the case, *Sumner* v. *Sherman et al.*, 13 Vt. R. 609.

The statute of limitations cannot avail the defendants, as it appears by the case, that both Christopher Bates, and his wife, died within fifteen years before the commencement of this suit. The deed from Bates and wife to Reed, was good to convey all the interest of Bates, according to repeated decisions; and no one, until his death, could disturb the possession taken under that deed; and with respect to Elizabeth, the statutes of 1787 and 1797 expressly reserve the rights of a feme covert; and as to her, no statute of limitation would commence, until, by the death of her husband, the impediment was removed, and she became discovert; and this action was commenced within fifteen years from that time.

On the whole, we think the county court were correct in all their decisions. The will was duly proved. Elizabeth Harris took an estate tail, under it, either as it was understood in England, and most of the states of the Union, or as it was understood in Connecticut. We think that this estate was not barred by the deed of herself and husband to Issachar Reed, and that there is no impediment in the way of the present plaintiffs' recovering the estate, according to the will of the testator, either from the vendue deed, or the statute of limitations. Moreover, we do not see anything in the

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policy of our government, at war with the doctrine of entailments, as they are not, and never have been, perpetuities; and this, or similar provisions are highly useful to enable a man to give to another an estate, to be enjoyed during the life, only, of the first donee, and after that to go to his heirs in fee simple.

We have said nothing upon the subject of common recoveries, as it was not involved, necessarily, in the decision of the question now before us. They have not been resorted to, nor do I know that it was ever necessary to resort to them in this state. This is the only case where the subject of entailments has come before the court; and for all future gifts in tail, the statute has declared their effect.

I would only add, in answer to the argument so much dwelt on, that common recoveries are in opposition to, and not consistent with, our recording system, that they are not more so than a title acquired by possession, the effect of a judgment in ejectment, or the lien acquired by a *lis pendens*; the evidence of neither of which, appears on the records of deeds in the town or county clerk's office.

The judgment of the county court is affirmed.

CALEB HALL *v.* IRA PARSONS.

In the case of an alleged continued possession, or a joint possession, of property, such as to render a sale or assignment fraudulent in law, the jury should not be instructed that, if they find certain alleged facts proved, they will be evidence of such a possession, or joint possession, as to render the sale or assignment thus fraudulent; but the question of possession or joint possession, should be left to them, to be decided from the facts they shall find proved, with general instructions, as to what constitutes possession.

THIS was an action of trespass, brought to recover the value of certain goods attached by the defendant, as sheriff, at the suit of Hunter, Kellogg & Co. on the 17th day of February, 1840, as the property of Caleb B. Hall. Plea not guilty, and issue to the country.

On trial in the county court, the plaintiff gave in evidence an assignment to him by the said Caleb B. Hall, under date of the 27th of January, 1840, of all the goods, wares and

merchandize of the said Caleb B., of every description, then in the store occupied by him, agreeably to an inventory of the same, to be delivered to the said Caleb, with the assigment, or as soon thereafter, as the same could be made; and, also, all the debts due the said Caleb B.; also, one horse and harness, one wagon, one sleigh, and all the grain and pork in the store; and, also, two pieces of land in Clarendon, of which he was to execute to said assignee suitable conveyances; which assignment was declared, therein, to be made for the purpose, first, of paying all the debts of said Caleb B. for which the said Caleb was holden as surety,—next of paying the amount the said Caleb had paid for him, and then to pay, equally, the other debts of the said Caleb B.

The plaintiff then proved that he had signed for said Caleb B., and was holden for him, to the amount of $4109.25; that the deed of assigment was executed and delivered on the day it bears date, and that a deed of bargain and sale was executed on the same day, of the real estate, mentioned in said assignment, and recorded in the town clerk's office at Clarendon, on the same day; that said real estate was worth about $1200, and that that, and the other property mentioned in the assignment, was all the property owned by the said Caleb B., and that the plaintiff was a man of property and responsible, and accepted of said trust. It further appeared, that the goods mentioned in said assignment, were in a store owned by the plaintiff, and which had been for some time occupied by said Caleb B., by the license of the plaintiff;—that Merrit Hall had been employed as a clerk by said Caleb B., and was so employed in the store at the time of the assignment; that he was informed by the said Caleb B. of the assignment, on the evening of the day it was made, and requested by him, not to mention it, until the next morning; that, at the time of the assignment, the said Caleb B. inquired of the plaintiff whether he should want said clerk, and was informed that he should want him till March, and if he bought goods for himself in the spring, he should want him through the summer, and that this was communicated to the clerk by said Caleb B. on the evening of the day the asignment was made.

The plaintiff also offered evidence, tending to show, that, on the morning after the assignment, he took possession of

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the horse, harness, waggon and sleigh, and removed them to his house, and, at the same time, went to said store and took down the sign of said Caleb B., assumed the charge and direction of the store, gave directions to said clerk, and forbid him to pay or deliver any of said goods on the debts of said Caleb B., without his, the plaintiff's, consent; and opened a new set of books of his own, on which all charges were thereafter made. He also offered evidence tending to show, that after he, the plaintiff, assumed the charge and direction of the store, said clerk received all his orders and direction from the plaintiff, and that said Caleb B. never after gave, or attempted to give, him any directions about said business, but disclaimed, at all times, any power or authority so to do; and that said Caleb B., after said assignment, never had or took the key of said store, but that the same was, ever after, in the possession of said clerk or the plaintiff, and that the plaintiff, on all occasions, claimed the sole right and authority over the property mentioned in said assignment.

The plaintiff further offered evidence tending to show, that the books and accounts and all the papers belonging to said Caleb B. were removed from the store to his, the said Caleb B.'s, dwelling house, immediately after the assignment, and that he kept the books about a week, when he returned the ledger and day book to the store, for the purpose of enabling plaintiff, to receive payment on said accounts; that an inventory of the dry goods was made before said assignment, and that the inventory of the remainder of said goods was completed within two or three days after, by the said Caleb B. and the said clerk; that, though said Caleb B. was frequently at the store, yet that he declined acting as clerk or salesman of said goods, except in two or three instances, when, at the request of plaintiff, and in his presence, he dealt out a few goods, and, in one instance sold a half pound of tobacco, without being requested—the clerk being in the back room.

The plaintiff also offered evidence tending to show, that said goods were attached on the 17th day of February, 1840; that said Caleb B. was not in the store on that day until after the attachment, and that said clerk was in said store, doing the business.

The plaintiff further offered evidence tending to show,

that said transfer or assignment was matter of general notoriety, and that he spent a part of his own time in said store, from the time of the assignment, until the attachment, and that defendant was notified of the assignment before making the attachment, and that said assignment, inventory, and list of liabilities were all exhibited to him before said attachment was made.

The defendant offered evidence tending to prove that the said Caleb B. remained in said store, after the assignment, and continued in the possession, and sold the goods to customers, and charged them upon the books, and in many instances paid his own debts, in goods from said store, with the knowledge and consent of the plaintiff; that he kept his books at said store for the purpose of settling with his customers, and spent most of his time there, after the assignment, and up to the time of the attachment, except about one week while he was posting his books, and was, during that time, at the store in the evenings; that, in some instances, he had the sole care and charge of said store, in the absence of the clerk, and the plaintiff, and sold goods and received pay; that he settled his books and received pay and took notes, and when balances were against him he paid in goods; and that the said Caleb B. paid in goods his outstanding due bills for goods, previously given.

The defendant also proved that the said Merritt Hall continued to board with the said Caleb B. after the assignment, up to the time of the attachment, as he had done before; and that the plaintiff had never made any contract with him, as clerk, or said any thing to him on the subject; and further, that while the books were at the house of the said Caleb B. he settled some accounts with individuals, and when balances were due from him, he gave minutes of the balances due, to the individuals, who presented them to Merrit Hall the clerk, and received the pay thereon.

The plaintiff, to explain defendant's testimony, offered evidence to prove that said accounts, settled by said Caleb B., were open and unadjusted accounts, that required to be settled by said Caleb B., and that, in every case, in which he received pay, he immediately delivered the money to the plaintiff; that, as to the boarding of the said clerk, when said assignment was made, said Caleb B. proposed that he should

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go to plaintiff's house to board, but that the plaintiff said he had better stay where he was until plaintiff and said Caleb B. should change houses, about the first of April thereafter, as his board would have to come out of the goods, as plaintiff said, and that he was as willing to pay said Caleb B. for boarding him, as to board him himself; and that the said clerk always slept in the store, and was at said Caleb B.'s only at meals.

The evidence being closed, defendant moved the court that plaintiff become non-suit, because said acts of said Caleb made the assignment fraudulent and void in law.

The court informed the counsel for the plaintiff, that they should charge the jury that, if they found the sale and assignment was made for a valuable consideration, yet, if they found that Caleb B. took the books to his house only for a short time, while posting, and then returned them to the store, and was in the store settling the accounts, sometimes paying the balance, when any was against him, out of the store, and assisting in dealing out goods to customers as well as to his creditors, although it was under the direction, and with the consent of the plaintiff; and if the same clerk remained in the store, selling goods, as before the assignment, and boarding with the said Caleb B. as before, it would be evidence of such a possession of the said Caleb B., or at least such a joint possession with the plaintiff, as would render the sale fraudulent and inoperative in law; and that it would make no difference, in this respect, that the sale was by way of assignment, and for the purpose of paying his, the said Caleb B.'s debts;—and further, that the plaintiff's taking down the sign, procuring a new set of books, and assuming the charge, direction and control of the store and business, would not be such an exclusive possession as to take the case out of the operation of the rule, if the same clerk remained in the store, no otherwise employed by the plaintiff, than by the said Caleb B., as stated in the evidence, and the said Caleb B. remained in the store settling his accounts and receiving pay thereon, and paying out of the store, on his own debts, notwithstanding the services of the said Caleb B. were necessary to the plaintiff as assignee, and he acted under the control and direction of the plaintiff.

The counsel for the plaintiff objecting to such charge, consented to a non-suit, to be set aside if the proposed charge was

erroneous. A non-suit was thereupon entered, and the plaintiff excepted.

E. L. Ormsbee and *C. Linsley* argued for plaintiff.

R. R. Thrall, *E. N. Briggs*, and *J. Collamer*, for defendants.

Upon a sale of personal property, there must be a substantial, visible change of possession, and one which is exclusive in the vendee. This rule has been so often settled by the supreme court in this state, that it is not open to discussion. *Durkee* v. *Mahoney*, 1 Aik. 116; *Weeks* v. *Weed*, 2 Aik. 64; *Mott* v. *McNeal*, 1 Aik. 162; *Kendall* v. *Landon*, 12 Vt. R. 516; *Judd & Harris* v. *Langdon*, 5 Vt. R. 231, similar to the present case; *Morris et al.* v. *Hyde*, 8 Vt. R. 356.

The only question is, whether the facts, contained in this case, bring it within the rule thus established. The facts very clearly show that there was a concurrent possession, after the sale or assignment, between the vendor and vendee or assignee, and that there was not an exclusive possession by the plaintiff.

The opinion of the court was delivered by

Hebard, J.—The questions in this case grow out of the opinion of the county court in relation to the character, and effect, of the testimony given on trial before that court.

The doctrine has become well settled, in this state, that possession must accompany the sale, or it will be fraudulent in law, as to creditors. In relation to what amounts to a change of possession, it has been a subject of discussion, and has, in a number of cases, been considered by the court, with reference to the particular circumstances of the particular cases. It has been considered a matter of policy, that, for the prevention of actual frauds, this rule should not be relaxed; and the important inquiry in this case is, whether what the plaintiff contends for, would tend to relax the rule. The case does not find that the defendant put himself upon the showing that this sale or assignment was fraudulent in fact, but merely void for want of such an open and visible change of possession as the law requires. The policy of this rule is to

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guard and protect the public against sales which are fraudulent in fact. The rule, requiring this change of possession, institutes the inquiry, in the case upon trial, in whom was the possession? The application of this rule as to possession, admits that the possession may be, in fact, in a third person, as agent for the vendee. The point to be determined in this case, in the first place, was—in whom was the possession, in fact, at the time of the attachment? If the possession was in Merrit Hall, then whose agent was Merrit Hall? These two inquiries rest entirely in proof, and should have been settled by the jury, with proper instructions from the court, in relation to what constitutes *possession* and *agency*. The court told the plaintiff that they should instruct the jury that, if they found certain facts *proved*, the sale would be fraudulent in law.

Those facts might very properly have been submitted to the jury for them to find, from the facts, whether the assignment was fraudulent, in fact. For it is true, under this rule, that, although the sale might have been formal, and exact in all the outward requirements, still, in fact, it might have been fraudulent and void. And, on the other hand, although the sale might have been made *bona fide*, being no way fraudulent in fact, still if it lacked this outward badge, a change of possession, it would be fraudulent in law, and void as to creditors. It then became important for the jury to find in whom was the possession at the time of the attachment; for, although possession may not accompany the sale, still, if possession is taken before the attachment, that is sufficient.

The *law*, applicable to the case, admits of no discussion. The only question is, whether the case comes within the law; for, in this case, as in all others, the *case* must bend to the *rule*, and not the rule to the case.

The court informed the counsel, that they should charge the jury that if they found certain facts, the sale would be fraudulent and inoperative, in law. Although those facts might be sufficient to incline the mind to that conclusion, still the *conclusion* should have resulted from the operation of the facts upon the minds of the jury, rather than upon the minds of the court. The jury should have been directed to the inquiry whether Merrit Hall was the servant of the

plaintiff. If he was, his possession was the plaintiff's possession. They should, also, have been directed to inquire, whether the possession of the plaintiff was exclusive, or whether it was concurrent with the said Caleb B.

What may constitute an exclusive possession, is well considered in the case of *Allen* v. *Edgerton*, 3 Vt. R. 442. That was a case of assignment of personal property, a part of which consisted of cloth, yarn, &c. in an unfinished state, and a quantity of wool in a factory; and it was a part of the agreement, that the assignor was to assist, or have a voice, in the sale and manufacture of the same—and that, in point of fact, the assignor was advising in relation to their manufacture. The defendant insisted, in that case, that those facts constituted a joint possession, and that the assignment was, therefore, void. The court held that a joint possession in the vendor and vendee, would be a fraud in law, and render the sale void as to creditors; but that if the sale was *bona fide*, in order to render it void, the possession and use of the vendor must be of the same description as that of a joint owner, in using, occupying and disposing of the property.

In that case, as in this, the important inquiry is, who was at the head, controlling the business? And if a careful observer would be at a loss to determine, it would be deemed a joint possession. And this is a fact for the jury to find from all the facts proved in the case.

The facts in this case might with propriety have been submitted to the jury, with proper instructions, for them to find in whom was the possession, and whether it was a joint, or exclusive possession. And in determining the point, it would be proper for them to consider the fact that the plaintiff owned the store and land—that the sign had been taken down—that a new set of books had been procured, and used, and whatever other outward change there was in the circumstances, and in the persons who were in attendance upon the business of the store.

In determining in relation to fraud, in law, it made no difference where the clerk boarded, or by whom he was first informed of the change. If the question was in relation to fraud, in fact, it would be different.

The case of *Farnsworth* v. *Shepard*, 6 Vt. R. 521, recognizes

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the doctrine that the vendor may have some occasional and temporary possession of the property, without affecting the validity of the sale.

In the case of *Wilson* v. *Hooper*, 12 Vt. R. 653, the court attach very much importance to the fact that the vendee had a deed of the premises on which the property was kept; and the question of concurrent possession was, very properly, submitted to the jury.

The case of *Judd & Harris* v. *Langdon*, 5 Vt. R. 231, is relied upon by the defendant. But that case is distinguished from the one at bar, in a number of important particulars. In that case the property sold was two colts. They were on a farm owned by the vendor. The plaintiffs took a deed of the farm, but did not put it on record till after the attachment. They never had the colts in their possession, nor did they employ any one to keep them; nor did they furnish any keeping for them; but they were left on the premises where the vendor had kept them, in the keeping of the same man, and foddered in the same manner as before. The present case is different in all these particulars. The plaintiff owned the store and land. On taking the assignment of the goods, the sign was taken down. A new set of books was opened. The same clerk was in the store, but he received his instructions from the plaintiff, and was in his employ, and kept the key, and had the sole care of the store. And all these facts were notorious as to the public, and actually known to the defendant. In the case of *Wilson* v. *Hooper*, the vendor and vendee were, in fact, in possession of the property, but the jury were left to find whether they had equal control and direction of it.

Judgment that the rule become absolute, and a new trial granted.

WILLIAMS, Ch. J., dissenting. — I have always considered that the principles adopted in this state, in relation to sales void and inoperative in law, for want of a change of possession, as highly salutary and conservative. It must be admitted that the principle has been greatly relaxed, if not abandoned, in Great Britain, and in some of our sister states. We have rather prided ourselves for our firmness in adhering to the rule, and our determination not to advance a whit, or

recede a jot, and have been complimented therefor by the learned and able Chancellor Kent, whose opinion, alone, is usually a sufficient authority in this court, on any question which comes up for our determination. I fear the time has arrived, which he anticipated, when we are about to yield, and retrace our steps, and to take from "this branch of law the quality of uniformity," and either decide directly against the rule, or engraft an exception as broad as the rule itself. The principle which was laid down in the case of *Edwards* v. *Hasler*, 2 Term R. 589, and which, it was said, had been ruled forty times in Guildhall, is, that if a creditor, or any one else, takes an absolute bill of sale or conveyance, the possession must be delivered immediately, *and accompany and follow the deed.* The court in this state have been very emphatic in their language on this subject, and have said there must be a substantial, visible, clear, notorious change of possession, not colorable; and in one case, where the property came back into the possession of the vendor without the consent of the vendee, still it was held to be liable to attachment by the creditors of the vendor. *Emerson* v. *Hyde*, 8 Vt. R. 352. The court have considered, heretofore, that the purchaser must take the possession entirely to the exclusion of any possession in the vendor; and have made use of these different and emphatic expressions to guard against any subterfuge or pretence by which the rule could be avoided; and have, inflexibly, determined that a constructive possession, which always attends the ownership of personal property, should not avail to protect it against the claims of the creditors of the vendor, while there is any actual possession still remaining with the vendor. The language of Lord Ellenborough, in *Woodall* v. *Smith*, 1 Camp. 332, is, that a concurrent possession with the former owner is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors.

Assuming the rule of law to be as laid down in the cases above named, and in the several cases where it has been before the courts in this state, we may inquire whether there is any reason why it should not apply to the present case, or any circumstance in the case to make it an exception to the rule, except the ever varying circumstances which may al-

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ways be expected to attend every case, where the object is, in fact, and in principle, the same.

I understand my brethren do not consider that it forms any exception to the rule, that the plaintiff was an assignee, and also an endorser, for C. B. Hall, the vendor. And, indeed, I know of no reason why it should. In *Edwards* v. *Hasler*, the assignment was made to a creditor. It is supposed, in all cases when the rule applies, that there is no evil intention; and that a full and adequate consideration has been paid.

The plaintiff was an endorser, or surety, for his son, the vendor; and, possibly, by that very act of his, the son procured goods to a large amount, and then obtained credit from the creditors, at whose suit the defendant, as sheriff, attached the property in question. The equity and justice of the claims of the attaching creditors are, at least, equal to those of the plaintiff. In examining the case, we are to look only at the evidence as stated by the court. The plaintiff claimed that he had proved an exclusive possession in himself. The defendant contended that he had proved a possession in the vendor, and acts of ownership by him, from the date of the assignment to the time of the attachment. It appears, by the bill of exceptions, that the facts, as claimed to be proved by *either* party, made a strong case in his favor. The defendant moved for a nonsuit, which the court declined to order. The court then told the parties how they should charge the jury, if certain facts were proved, and upon that the plaintiff submitted to a nonsuit. In determining the correctness of the positions laid down by the county court, we are not to resort to the evidence as detailed in the bill of exceptions. Every fact there claimed to have been proved might have been controverted to the jury. I shall, therefore, take no notice of the evidence in relation to the key of the store, on the one side, or any of the evidence on the other, except so far as the county court noticed them in the charge which they declared they should give, as the plaintiff was at liberty to dispute every fact there stated, and obtain the decision of the jury thereon. The court took nothing from the jury, nor did they lay any particular stress upon any part of the testimony; but, if certain facts were proved, they said it would be evidence of such a possession in the vendor, or, at

least, of such a joint possession, with the plaintiff, as to render the sale inoperative. Those facts were these:

Caleb B. Hall had occupied the store, and carried on the business of merchandizing there for some time. The building was owned by his father, the plaintiff. After the assignment he, Caleb B., took the books home to his house for a few days; but, at that time, was in the store, evenings. After a few days he returned the books to the store, and was there himself, settling his accounts on book, and, when the balance was against him, paying that balance in goods, out of the store. He assisted in dealing out goods to customers, as well as to his creditors. The same clerk, Merritt Hall, remained in the store, selling goods as before the assignment, boarding with Caleb B., the vendor, as before; informed of the assignment only by Caleb B., and spoken to, to remain there for the plaintiff, only by the said Caleb B. Was not this evidence of a possession, or joint possession, in Caleb B., as the county court decided? To me it appears very clear that it was. What were the acts of possession of the plaintiff, as supposed, in the charge intended to be given? *Consenting* that Caleb B. should thus pay his creditors — assuming the control — getting a new set of books, taking down the sign of Caleb B., and directing Caleb B. to employ the clerk. Neither of them calculated to hold out, publicly, that he was the sole and exclusive owner and possessor, and that Caleb B. was not such an owner and possessor.

Every thing was calculated to hold out the appearance that there was no change of ownership or possession. The former owner, Caleb B., at the store, settling his accounts, dealing out goods to his creditors, and behind the counter waiting upon customers. This clerk, who had been a member of his family, boarding with him, still remaining a clerk in the store, and a member of his family. And can it alter these unequivocal acts of possession, that the plaintiff consented to this, when his very consent is the fact which should avoid his assignment — or that he kept a new set of books — a circumstance not at all calculated to show any visible change of possession — or that he took down the sign, which might be done even while the clerk was dealing out goods — or that the clerk and the vendor acted with his consent, as his agent? To me it appears very clear that the possession of

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the plaintiff was nothing more than a constructive possession; or, at least, that there were such acts of ownership and possession in Caleb B., and so few indications of any change, of either ownership or possession, as to subject the goods in the store to the attachment of the creditors of Caleb B. Hall, the vendor. I must, therefore, dissent from the opinion delivered by my brother as the opinion of the majority of the court.

ABIGAIL BIGELOW, Administratrix of HENRY BIGELOW, *v.* The CONGREGATIONAL SOCIETY of Middletown.

(In Chancery.)

Questions determined by this court, as a court of chancery, before the revised statutes were in operation, are not to be reëxamined on an appeal from the chancellor.

The report of a master on matters of fact, is to be accepted, unless it plainly appear that he mistook the law or the evidence.

Chancery will, in some cases, to prevent a failure of justice, decree against the individual members of a society, incorporated under the statute for the support of the gospel.

FROM the bill and answers, in this case, it appeared that, for a long time previous to his decease in 1832, the intestate had been settled as a minister over the Congregational Society in Middletown, and that, at the time of his decease, the society was indebted to him in a large amount, for his services; that, upon the presentation to the commissioners on his estate, of a claim of the society against him, as their treasurer, his claim was presented in off-set, and a balance allowed, in favor of the estate, by the commissioners, which allowance was confirmed, upon an appeal, and a final judgment was rendered against said society, for $1,333.94 damages, and $147.60 cost.

It also appeared that, at the decease of the intestate, the available funds of the society, consisting principally of notes for money loaned, amounted to about $1,500, which notes, subsequently, went into the hands of members of the society; and that in January, 1834, a new society was formed, by which a minister was employed, who was paid from the said funds, whereby they became much diminished.

The bill was brought to obtain a discovery of the persons

composing the society, at the decease of the intestate—a decree against them for the payment of said judgment—and the appointment of a receiver of the funds and property of the society, to be appropriated towards such payment.

Upon the hearing of the case, at the January term, 1839, of the supreme court, sitting as a court of chancery, (see 11 Vt. R. 283,) it was decided that the oratrix had a just claim to have all the funds, existing at the death of the intestate, or so much thereof as should be necessary for the purpose, appropriated to the payment of said judgment; and that the individual members of the society at that time, who could control the same, were responsible that they should be so applied; and, thereupon, the court decreed that a receiver be appointed to receive and collect whatever might remain of the funds, and apply the same, or so much thereof, as might be necessary for the purpose, to the payment of said judgment; and that it be referred to a master, to ascertain the situation of the funds in June, 1832, at the decease of the intestate, and who were members of the society at that time.

The receiver, appointed in pursuance of said decree, made report to the chancellor for the first judicial district, that the sum of $642.99, after deducting the costs and charges of the receiver, was the whole that he found good and collectable of the said demands; and that he had collected the same and paid it over to the oratrix; which report was accepted.

The master, appointed in pursuance of the decree, reported that he found that, at the decease of the intestate, the funds of the society that were good and collectable, amounted to the sum of $1,567.21. He also reported the names of twenty-five individuals who were members of the society at the decease of the intestate, of whom three had subsequently removed from Middletown, and two others had deceased.

The master also reported the following facts at the request of the parties:

That, in 1791, a congregational society was formed in Middletown, whose articles of association provided that, in case said articles should be altered, no one should be holden without signing the altered constitution; that, in May, 1804, the constitution was revised; and again revised in 1809; that the last revision declared the former constitution null

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and void, and provided that, "if any should die, or become a member of any other religious denomination, or remove to a greater distance than ten miles from the meeting-house, in either case, his right of membership should discontinue"; that in 1815, the society adopted the form of association prescribed by the statute of Nov. 10, 1814, entitled, 'an act in addition to an act for the support of the gospel,' and that the names of fifteen individuals (named by the master, and part of the said twenty-five, reported as belonging to the society at the decease of the intestate) were subscribed to the same, previous to the said decease, and all in the hand writing of one of the number; that four others of the said twenty-five signed the constitution of 1809, and did not sign the articles of 1815, until after the decease of the intestate, but continued to act as members of the society; that six others of the twenty-five, also signed the constitution of 1809, and had never signed the articles of 1815, but had acted as members of the society until the decease of the intestate; and that, in 1822, the society recognized the constitution of 1809 as the then existing constitution, by amending the same.

The master further reported that Jonathan Morgan, (not one of those reported by him, as members of the society in 1832) signed the revised constitution of 1809; that his name was attached to the articles of association of 1815, but not in his handwriting; that he continued to act as a member of the society until about 1824, when, in consequence of a difficulty with Mr. Bigelow, he left the society, and went with the baptist society in Middletown, and never acted with the congregational society afterwards, but was considered as separate from it, and refused to act as one of a committee of the society, though appointed as such in 1825, and in 1828, and attended the baptist meeting and paid to that society.

Upon the coming in of this report, the defendants excepted to the same upon the following grounds,—

1. That the association of 1809 was, in no way, connected with the association, under the statute in 1815:—

2. That if the articles of association adopted in 1809, were to govern, or vary those of 1815, there was no fact stated in the report, by which Jonathan Morgan could be considered as having been discharged from being a member of the society at the time of Mr. Bigelow's death, in 1832.

3. That by the association of 1815, under the statute, and by that only, the society were made a corporation; and individuals never were, or could be, by the terms of the statute, members of it, until they had subscribed the articles of association, and, therefore, those who did not subscribe those articles until after the decease of the intestate, were not, at that time, members of the society, although they might have occasionally acted with it.

4. That when the society organized, in 1815, all previous organizations must, necessarily, have been abandoned.

The chancellor overruled the exceptions, and, thereupon, decreed, that certain individuals—being those reported by the master to have been members of the society at the decease of the intestate, with the exception of those reported by him to have subsequently deceased, and to have removed from Middletown—should pay to the clerk, for the benefit of the oratrix, the sum of $1,399.16, and her costs.

From this decree the defendants appealed.

J. Clark, for defendants.

E. L. Ormsbee, for oratrix.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This case was before this court, sitting as a court of chancery, before the Revised Statutes went into operation. Any questions then settled, are not to be re-examined on an appeal from the chancellor, if he has followed the principles settled in the cause. The defendants were a corporation of an anomalous nature. The members were fluctuating, and not like owners of stock. The court, having the corporation before them, had, also, the individual members, (several of whom appeared and answered) and were under the necessity, in the language of Lord Eldon, in the case of *Adley* v. *Whitstable Co.*, 17 Vesey, 324, to deal with them the best way we could to prevent a failure of justice. If, by resisting the demands of justice, they exposed their property to ruin, the mischievous consequences must be attributed to themselves.

The defendants made a claim against the estate of Bigelow, and after a long and tedious suit at law, they were found indebted to him, at the time of his death. They had a fund amply sufficient to meet the debt due to Mr. Bigelow,

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which they should have applied in payment. If they have suffered it to be wasted or expended in fruitless endeavors to resist the claim of the intestate, both at law and in chancery, the plaintiff is not to be further burthened with expense, or experience any further difficulty, in consequence of any controversy among themselves, or any difficulty of settling their individual liabilities.

The master was directed to inquire after, and ascertain certain facts, and make his report thereon. We do not perceive that he has made any errors, or arrived at any wrong conclusions, on the facts he was directed to ascertain and report.

From the report of the master, it appears that Jonathan Morgan was not a member of the society, after the year 1824; and was not one on whom the decree was to operate. We do not, therefore, think proper to alter the decree of the chancellor so as to include him, but merely to say it should be without prejudice to any claims the defendants may hereafter wish to establish against him.

The decree of the chancellor is affirmed with additional cost against the surviving members; and no cost is allowed to any of the persons named in the bill, who were not found to be members of the society at the decease of Mr. Bigelow. And the chancellor will be directed to carry the decree into execution.

DAVID HODGMAN, jr. v. REMEMBRANCE HITCHCOCK, HARRY W. MERRILL and HARRY HITCHCOCK.

(In Chancery.)

H. conveyed to M. & H. certain premises, taking back a bond of defeasance. By a subsequent arrangement between these parties, for the purpose of enabling H. to pay the amount due to M. & H. upon the mortgage, the former surrendered to the latter their bond of defeasance, who, thereupon, conveyed the premises to R. H. to whom H. at the same time, conveyed whatever interest he was supposed to have in them. R. H. thereupon advanced a certain sum which went to M. & H. in satisfaction of what was mutually estimated, and believed, by H. and M. & H. to be due the latter; and R. H. at the same time, executed a bond of defeasance to H.:—*Held*, that, although the sum estimated to be due to M. & H. and advanced by R. H. fell short of the sum actually due, there remained no subsisting lien upon the premises in favor of M. & H. for the security of such balance.

THIS was the case of a bill brought to redeem certain premises, to which the defendants severally made answer; and upon a hearing on the bill and answers there was a decree, from which the defendants, Harry W. Merrill and Harry Hitchcock appealed. The facts in the case sufficiently appear in the opinion of the court.

After argument by *E. L. Ormsbee* for the orator, and *R. R. Thrall*, for defendants, the opinion of the court was delivered by

ROYCE, J.—This is an appeal from chancery. Hodgman, the orator, brought his bill to redeem certain premises, which he had first conveyed to Merrill and Hitchcock, and afterwards to Remembrance Hitchcock; taking back, upon each occasion, a writing of defeasance. The cause was heard upon the bill and answers.

The facts, which are deemed material to be noticed in the present state of the case, are substantially these:—After the debt secured to Merrill & Hitchcock had accumulated to the sum of three thousand dollars, they required payment, and it was agreed that application should be made to Remembrance Hitchcock for the money. In order to carry this arrangement into effect, the orator surrendered to Merrill & Hitchcock their bond of defeasance, and they conveyed the premises to Remembrance Hitchcock, to whom the orator also conveyed whatever interest he was supposed to have in the premises. Remembrance Hitchcock, thereupon, advanced the sum of three thousand dollars, which went to Merrill & Hitchcock, in liquidation of their demands against the orator; and Remembrance Hitchcock, at the same time, executed his bond of defeasance to the orator; thus in effect, creating a new mortgage from the orator to Remembrance Hitchcock to secure the repayment of the three thousand dollars. It now appears from the answers of Merrill & Hitchcock, that the adjustment which took place at the time of said arrangement with Remembrance Hitchcock, did not include all their claims against the orator, which were secured by his original mortgage to them; but that nearly five hundred dollars of these claims, including interest and costs, with some additional

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advancements to the orator, still remain due. This is also reported by the master. And the sole question is, whether, in order to redeem the premises, the orator should have been decreed to pay this amount to Merrill & Hitchcock, besides paying to Remembrance Hitchcock the sum due upon the mortgage to him.

It is clear that Remembrance Hitchcock could not insist upon such a payment, in right of Merrill & Hitchcock, because it would be inconsistent with his bond to the orator, which obliged him to re-convey on payment simply of his own debt. And if Merrill & Hitchcock can claim a decree for it in this suit, it must be upon the ground of some equitable interest still existing in, or atttaching to, the mortgaged premises, for their benefit. It is only between them and the orator that any such interest can be pretended to exist. And here the question is not, whether, upon the facts disclosed, a court of equity might compel the orator to create a lien upon his estate in the premises in favor of these creditors, but whether such lien has, all along existed, as a basis for the decree sought. These defendants impute no fraud in the arrangement which brought Remembrance Hitchcock into their place. On the contrary, the orator seems to have acted throughout, upon that occasion, in accordance with their wishes and direction. They admit that the three thousand dollars was mutually estimated and believed at the time, to be sufficient to satisfy all their claims against the orator. In this belief they, as well as the orator, conveyed, unconditionally, to Remembrance Hitchcock, and these defendants took up and cancelled their bond of defeasance originally given to the orator. As a necessary consequence of this, the relation of mortgagor and mortgagee between these parties became dissolved. And the transaction conclusively shows that such a result was intended.

There was, therefore, no such abiding interest or lien in favor of Merrill & Hitchcock as they now claim. The allegation in their answers, that they never discharged their lien, if taken in a narrow and literal sense, is consistent with the legal effect of the transaction ; since they may have conveyed their lien to Remembrance Hichcock, or suffered it to become extinguished, without any formal discharge of it. But if tak-

en in the sense now contended for, it is inadmissible, being an averment against the known operation and effect of their own acts. Neither can any effect be given, for the present purpose, to the subsequent request of the orator, as alleged in the answers of these defendants, that they should make him further advances and retain their lien. They had no lien, in faith of which to make such advances.

On the whole, without deciding whether the court of chancery, upon proper proceedings taken for that purpose, might have set up an equitable mortgage against the orator, in favor of Merrill & Hitchcock for the balance of their claims, we are satisfied that it could not be done in the present state of this suit.

Decree of the chancellor affirmed.

ELI HART *v.* MOSES M. STRONG.

(In Chancery.)

Where the defendant neglected to answer a bill in chancery, agreeably to the rules of the court, and the bill was, on that account, taken as confessed, and a decree was made thereon, it was held that the cause was not appealable, though the defendant had not neglected to appear.

THIS was the case of an appeal from a decree of the court of chancery. There was an appearance by the defendant in that court, but he did not make answer to the bill, and it was taken as confessed; and it was referred to a master to take an account. From the decree made upon the acceptance of the master's report, the defendant appealed; and upon the entering of the appeal in this court, the orator moved that it be dismissed.

R. R. Thrall, for the orator, contended that the defendant was not entitled to an appeal, for the reason that the bill was taken as confessed, and a final decree was made in consequence of the neglect of the defendant to make answer, agreeably to the rule or order of court. Revised Statutes, page 150, sec. 18.

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E. L. Ormsbee and *E. F. Hodges*, for the defendant, contended that the provision in the statute (p. 150, § 18) applies only to the case of a final decree, made for non-appearance, or a *refusal* to answer; — that it was not intended to apply in cases where, after appearance, the bill is permitted to be taken as confessed, as a kind of general demurrer, and when all the matters of defence may well arise upon the master's report.

The opinion of the court was delivered by

BENNETT, J. — This case comes before this court by an appeal from the court of chancery. There was an appearance by the defendant in the court of chancery, but having neglected to answer, agreeably to the rules of that court, the bill was taken as confessed, and referred to a master to ascertain the sum due; and, upon the coming in of the report, the same was accepted, and a decree made accordingly. The orator has filed, in this court, his motion to dismiss the cause upon the ground that it was not appealable. The right of appeal is not given in a case, "where the bill is taken as confessed, and a final decree made in consequence of the non-appearance of the defendant, or for his neglect to make his answer agreeably to the rule or order of court." Though the bill in this case was not confessed, because of the non-appearance of the defendant; yet, he neglected to answer the bill agreeably to the rule of court, and the decree was the consequence of such confession. The chancellor might have ascertained the amount due without a reference, if he had chosen; but, as matter of convenience, it was referred. The decree followed as a consequence of the confession. The case clearly comes within the first exception of the 18th section of the chancery act. Revised Statutes, p. 150.

Appeal dismissed.

CALEB PARIS *v.* JONATHAN C. DEXTER.

(In Chancery.)

Chancery will not relieve the maker of a note, given upon the compromising and settlement of a suit brought for the *bona fide* purpose of a recovery, and in which there was evidence tending to prove the allegation on which it was founded, unless it appear that the maker was incapable of understanding the nature, extent and effect of the business he was transacting, or was so overreached as to make the retaining of the note unconscionable.

THIS was an appeal from a decree of the court of chancery dismissing the orator's bill.

The orator in his bill, set forth and charged, in substance, that, on the 28th of August, 1839, the defendant commenced an action of slander against him, based upon allegations which were false and malicious; that the defendant caused the orator to be arrested, and so having him in arrest, made use of various fraudulent devices to extort money from him, in compromise and settlement of the suit, by means of which the orator, being seventy-three years of age, and of weak bodily health, and feeble mental capacity, was induced to execute a note to the defendant for $500 payable at the decease of the orator; and praying that the defendant might be decreed to deliver up said note, &c.

The defendant, in his answer, admitted the institution of the suit, the arrest of the orator, and the execution of the note, but denied the allegation of malice, and falsehood, and that he used fraudulent devices in effecting the compromise of the suit, and that the orator was of weak health and feeble capacity—and alleged that the suit had been brought in good faith, for certain slanders of the defendant, and particularly that of charging him with having been bribed to betray his trust, as counsel for the orator.

The answer was traversed and testimony taken. The facts found sufficiently appear from the opinion of the court.

C. B. Harrington, for orator.

J. C. Dexter, pro se.

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Paris v. Dexter.

The opinion of the court was delivered by

HEBARD, J. — To grant the relief prayed for, the orator must prove that, at the time he gave the note, he was in such an imbecile state of mind as to be incapable of understanding the nature, effect and extent of the business he was transacting, arising from some temporary cause, or the infirmities of age, — or he must show such overreaching and fraud on the part of the defendant, as will make it unconscionable for him to retain it.

We think the orator has not established either of these points. It is fully established by the proof, that defendant thought himself aggrieved by the representations of the orator in regard to his character as an attorney; and there was evidence which, at least, *tended* to prove that fact. Upon that, unquestionably, the defendant had a right to institute a suit to recover damages for the slanderous imputation, and to prosecute such suit to a final result, without subjecting himself to damage for a malicious suit, even though he might fail of a recovery.

The claim and suit were such a matter for adjustment and settlement, as would be a legal consideration for a promise. The orator might have thought there was some doubt about the result; or if not, he might choose to pay something to be rid of the expense and trouble of defending the suit; and if for that the suit was discharged, there cannot be any question about the legality of the consideration.

The decree of the chancellor is affirmed.

BENNINGTON COUNTY.

FEBRUARY TERM, 1843.

PRESENT HON. STEPHEN ROYCE, } *Assistant Justices.*
" MILO L. BENNETT, }
" WILLIAM HEBARD, }

ROYAL W. IRISH *v.* ISAIAH MATTISON.

An enlistment into a fire company, from an independent company of militia, works an exemption from military duty, under the militia law of 1837, the same as such enlistment from a standing company.

THIS was an action for false imprisonment, and was submitted to the county court, upon the following case stated by the agreement of parties:

"The imprisonment of the plaintiff by the defendant is admitted. The defendant, at the time of the arrest and imprisonment of the plaintiff, was quarter master of the first regiment, first brigade and second division of Vermont militia, and justifies said arrest and imprisonment under an execution issued by Norman Blackmer, colonel of said regiment, for the amount of a fine for the non-performance of military duty. It is admitted that, at the time of the non-performance of said military duty, and for about one year previous, the plaintiff was, and had been, a member of the North Bennington Fire Company, at Bennington, and was duly returned by the regular officers of said fire company, as one of the twenty members exempt from military duty.

"It is also admitted that the plaintiff, previous to his enlistment into said fire company, was a member of the artillery company at Bennington, belonging to the aforesaid regiment, and had never been discharged therefrom, by any of the commanding officers of said company. The regular organization of said military company, the warning of the plaintiff to do military duty, and his omission to do the same, are all admitted. The due organization of said fire company, and

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the excuse of the plaintiff, as a member of the same, to the proper military officer, duly made, after having been warned to do military duty, are also admitted. Now, if the court shall be of opinion that the plaintiff was not subject to do military duty in said artillery company, from the facts above stated, then judgment is to be rendered for the plaintiff for $5.25 damages and his cost; otherwise, the defendant to recover his cost."

Upon this statement of the case, the court rendered judgment for the defendant, to which the plaintiff excepted.

A. P. Lyman, for plaintiff.

It is contended that the plaintiff, while a member of the North Bennington Fire Company, was an exempt from military duty, notwithstanding he might have been a member of an independent military company previous to his enlistment into the Fire Company, and had never been discharged therefrom. Comp. Laws, 557, ch. 1, §2. If the plaintiff was exempt from military duty, no military officer had any jurisdiction over him. *M'Lane* v. *Stewart*, Swift's Ev. 359; *Darling* v. *Bowen*, 10 Vt. R. 148.

The second section of the seventh chapter of the militia law, Comp. Laws, 568, cannot be construed to apply to individuals not subject to military duty. It is intended to regulate the conduct of individuals *subject* to military duty, who might wish to change their situation from one company to another.

It is said the plaintiff's privilege is to be distinguished from that of the judges of our courts, for the reason that his connection with the North Bennington Fire Company was a voluntary act. But the plaintiff contends that it is the situation he occupies that makes him an exempt, and not the way or manner in which he acquired it. Ministers of the gospel, faculties and students of colleges, practising physicians, ferrymen and millers, all occupy their places by their voluntary act, and yet are exempt by the statute.

But it is further contended, that the statute under which the fire company is organized, makes the plaintiff an exempt from military duty, independently of the law governing the militia. Rev. Laws, ch. 14, §13.

J. S. Robinson, for defendant.

The plaintiff, at the time he enlisted into the fire company, was a member of an independent company. It is true that the second section of the first chapter of the militia law exempts from militia duty, members of fire companies to the number of twenty to each engine; but the plaintiff, previous to his enlistment into the fire company, had subjected himself to the second and fourth sections, chapter seventh of the militia law, which provide that a private of a standing, enlising into an independent, company, shall be holden to serve in such company until he shall have arrived to the age of forty years, or until he shall be discharged by the commanding officer of the company or regiment to which he belongs. Can the plaintiff, then, by his voluntary act, discharge himself from a standing company? Is he not liable to do military duty, until discharged, in the way provided in the second and fourth sections? Where there are contradictory provisions in a statute, the latter will suspend the former, unless the court can so construe them that the whole may, if possible, stand.

It is apparent, then, upon a just construction of these several provisions of the law, that the legislature intended to restrict the exemption, to the privates in the standing companies, who should become members of fire companies. Dwarris on Stat. 31, 85 & 6.

The opinion of the court was delivered by

ROYCE, J. — The case is governed by the militia act of November 1, 1837. In the second section of the first chapter of that statute, "members of fire companies, to the number of twenty to each engine, in times of peace only, and 'so long as they shall continue members of said fire company," are declared to be exempt from military duty. This section, standing alone, would be quite sufficient to determine the case in favor of the plaintiff. But the first, second and fourth sections of chapter seven, of the same act, must also be noticed. The first section of this chapter authorizes enlistments from the standing companies of militia into the independent companies of light infanty, riflemen, and artillery. The second section enacts, that non-commissioned officers and privates, who shall enlist into any such indepen-

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dent company, shall be holden to service therein until they respectively arrive at the age of forty years, unless discharged from such service by the proper officers. And this obligation to serve is repeated in the 4th section.

The question, then, is, whether the second section of the first chapter, which apparently exempts the plaintiff from military duty, is counteracted and controlled by these sections of the 7th chapter. It is argued that this should be the effect, according to certain acknowledged rules for construing statutes: — as that when a general intention is expressed in a statute, and the act also expresses a particular intention incompatible with the general one, the particular intention should be considered in the nature of an exception. And again,—that if the latter part of a statute be repugnant to the former part, it shall stand, and, so far as it is repugnant, be a repeal of the former part; because it was last agreed to by the law-makers. In order, however, to give these rules of construction the effect contended for, in this instance, we should first be satisfied that the legislature, in these different parts of the statute, had in view the same subject-matter for the law to operate upon:—in other words, that the sections, to which I have referred, in the 7th chapter, may, as probably, have been intended to embrace the persons described in the 2d section of the 1st chapter, as other persons generally. But we think that such a supposition is not justified, upon a full view of the statute. There is no provision in the 7th chapter, expressly extending to the exempts mentioned in the 1st chapter. And when clergymen, magistrates, executive officers, and certain other classes of persons, had been once exempted from military duty by the act, it is utterly improbable that they should have been purposely rendered liable to that duty by another portion of the same statute. It has been decided, in this state, and elsewhere, that persons exempted by law from military duty, are not within the appropriate military jurisdiction. It should, therefore, be presumed, that when the statute had once designated a class of permanent exempts, it proceeded throughout, with a tacit exclusion of those persons from its subsequent provisions.

Again, — it is contemplated that the independent companies will be mainly filled up by enlistments from the stand-

ing companies; but exempts are not supposed to remain members of the standing companies. It is also provided by the 4th section, already cited, that if a person enlisting into an independent company shall neglect, for three months, to equip himself, he may be discharged and turned back upon the standing company; but an exempt could not be thus turned back, nor compelled to serve in the standing company. Hence, it may be strongly inferred, that permanent exempts are not within the purview of the 7th chapter.

It is true, that the plaintiff must be taken to have acted voluntarily in becoming a member of the fire company. But if this should deprive him of his exemption from military duty in an independent company, it would seem that he should be equally deprived of it, had he remained in the standing company. In each case the obligation to serve till a given age is sufficiently express and peremptory.

It may be material to remark, that the plaintiff had first enlisted into the independent company. Had he so enlisted when already an exempt as a member of the fire company, the case might, perhaps, deserve a different consideration.

Judgment of county court reversed, and judgment for plaintiff to recover $5.25 damages, and costs.

Town of Manchester v. Town of Springfield.

While the act of 1801, relating to legal settlement, was in force, the rule of the common law was in force, that an illegitimate child has its settlement where born, and cannot gain a derivative settlement from its mother.

Under the act of 1801, a woman living with a man as his wife, under a void marriage, was not included in a warning of the man and his family; and she might gain a settlement by residence.

An illegitimate child, living in a town with its mother, until four years of age, did not, under the act of 1801, gain a settlement by residence, though not warned out.

This was an appeal from an order of removal, from Manchester to Springfield, of Martha M. Sheldon and her seven minor children, and came on to be tried on issue joined to the defendant's plea, that the last legal settlement of the said Martha M. and her said seven children, was not in the town of Springfield.

On trial of the cause in the county court it appeared,—

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that, on the 19th day of June, 1828, John Sheldon and the said Martha M., were duly joined in marriage, and that the said seven minor children, were children of the said John and Martha M. by that marriage; that the said John died at Manchester, February 11, 1842. It further appeared, that Israel Sheldon, father of said John, was duly married to one Lucy Kibby of Charlotte, January 26, 1805; that on the 4th day of January, 1807, he was married to one Charlotte Perry of Springfield, while the said Lucy was living and undivorced from him; that the said Israel's legal settlement, at the time of his marriage with said Charlotte Perry, and the birth of the said John Sheldon was in Charlotte in this state, and they lived together, for seven years, as husband and wife, and had four children; that the said Lucy remained undivorced from the said Israel, until the year 1816, and that she was still living; that the said Charlotte was the daughter of Joseph Perry, who moved to Springfield in 1798, at which time the said Charlotte was seven years of age, and the said Charlotte resided with him, in Springfield, until her marriage to the said Israel, in 1807; that, in June, 1810, the said Israel and Charlotte moved to Manchester and lived there together, and about the middle of September, 1810, the said Charlotte went from Manchester to Springfield on a visit to her friends, and while there, to wit, on the 17th day of October, 1810, the said John Sheldon, her son, was born; and that, in the fore part of December thereafter, the said Charlotte, with the said John, returned to Manchester, and continued to reside there with the said Israel for nearly four years.

The plaintiff offered in evidence a process against Israel Sheldon and family, warning them from the town of Manchester, dated September 4, 1810, to the introduction of which the defendant objected, and the court rejected the same; to which decision the plaintiff excepted.

Upon the above facts, the court decided that the last place of legal settlement of the said Martha M. Sheldon and her seven minor children, was in said town of Springfield, and rendered judgment for the said town of Manchester to recover of the town of Springfield their costs; to which decision of the court, the defendant excepted.

J. S. Robinson, for defendant.

The paupers removed are the wife and children of John Sheldon, who was the illegitimate child of Charlotte Perry. He was born in Springfield, in 1810, and his mother, afterwards, acquired a settlement in Manchester, while the act of 1801 was in force.

The question to be decided is, where was John Sheldon's legal settlement at the time his family became chargeable?

I. By the common law, a bastard's place of birth determines the place of his settlement. This rule has its foundation in the maxim of Lord Coke, who says, in judgment of law, a bastard is *nullius filius;* but at the present day, in England, the rule is restricted in its application to the case of inheritances. In this state, the maxim has lost its force, and the policy of our law is the reverse of that of England.

II. It is claimed that, under the act of 1801, illegitimate children either take and follow the settlement of their mother, or are capable of acquiring a settlement in their own right, by a year's residence in a town, under the fourth section of the act, unless warned.

1. Illegitimate children take and follow the settlement of their mother. The common law denies that the relation of parent and child exists between an illegitimate child and its mother; but since our law recognizes the existence of this relation, it is vain to oppose this fiction of the common law to the legal consequences which attach to this relationship. The mother is entitled to the custody (5 T. R. 278,) and services of her child, (12 Mass. 383,) and is bound to maintain him. She can transmit an inheritance to him, and he can inherit from her; and provision is made for his legitimation. Rev. Stat. 292. It would be singular, indeed, to hold that the relation of parent and child is recognized to exist, for every other purpose but that of determining the settlement of a pauper. It has been repeatedly adjudged in Connecticut, independent of any statutory provision, that illegitimate children take and follow the settlement of their mother. 1 Sw. Dig. 48; 1 Root, 155; Reev. Dom. Rel. 276; 5 Conn. 586; 6 do. 37; 9 do. 330. In this state, the question now raised, has never been decided. In *Plymouth* v. *Windsor*, 7 Vt. R. 327, the mother had no settlement within the state, and the court held the child was settled

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where born. The decision would have been the same had the child been legitimate, since legitimate children, where neither parent has a settlement within the state, are settled where born. 14 Petersdorff, 315.

2. John Sheldon, under the act of 1801, acquired a settlement in his own right, by residence, in Manchester. If the court adopt the doctrine of the common law, that illegitimate children have no parents, to whose settlement they can be referred, John Sheldon must have acquired a settlement under the 4th section of the act, by one year's residence, unless warned.

The language of this section is—"All and every person;" which embraces both minors and adults. In New Hampshire, under a similar statute, it was held, that both legitimate and illegitimate minor children acquired a settlement by one year's residence, unless warned. 1 N. H. 260, 264.

III. The warning is defective. Neither Charlotte Perry or John Sheldon are named in it, nor were they included under the description of Israel Sheldon and family, since those only constitute a man's family, for whose support the law imposes upon him an obligation to provide. 2 Vt. R. 155. The marriage between Israel Sheldon and Charlotte Perry was void by reason of his prior marriage, and she, then, was to be treated as a single woman, who could acquire a settlement in her own right, but whose settlement could not be affected by the warning in question.

D. Roberts, jr., for plaintiff.

Joseph Perry, by a residence in Springfield from 1798 to 1807, acquired a settlement in that town. Charlotte Perry, his daughter, residing with him during that time, and at the date of her pretended marriage to Israel Sheldon, (January 4, 1807,) she, then being but 16 years of age, had, therefore, her settlement in Springfield; and so, too, when John Sheldon her son by Israel Sheldon was born, (October 17, 1810) unless by such pretended marriage she took the settlement of Israel Sheldon in Charlotte. But Israel Sheldon, at the date of the pretended marriage to Charlotte Perry, and for many years afterwards, had a wife, *de jure*, living, and so the marriage to Charlotte Perry was void.

John Sheldon, then, was a bastard, born in Springfield,

the place of his mother's settlement—she then residing in Manchester, and afterwards acquiring a settlement there. If settled in Springfield, at his birth, he acquired no settlement elsewhere, afterwards, unless in Manchester, *in his own right*, by being in that town with his parents until near four years old, or, *in right of his mother*, through her after-acquired settlement there. These paupers, the lawful wife and children of John Sheldon, now dead, take his settlement. *Where was it?*

In his own right, being a minor, he could acquire no settlement in Manchester. *Winchenden* v. *Hatfield*, 4 Mass. 123; *Somerset* v. *Dighton*, 12 Mass. 383: *Wells* v. *Westhaven*, 5 Vt. R. 322.

He could not acquire a settlement there, in right of his mother. From 1801 to 1817, there was no statute regulating the settlement of bastards. To resort, then, to the rule of the common law — a bastard was settled where born, without reference to the settlement of the mother, and retained that settlement until he acquired one in his own right. 1 Bl. Com. 363, 459; 1 Ld. Ray. 567; Doug. 89; 1 Salk. 427; *Plymouth* v. *Windsor*, 7 Vt. R. 327; Swift, C. J. in *Hebron* v. *Marlborough*, 2 Conn. R. 18.

By the act of 1897, it was provided that, "every bastard 'child shall be deemed and adjudged to be settled in the 'town or place of the last legal settlement of his or her mother." Therein the rule of the common law was changed. The act of 1801 expressly repealed this provision and abolished every mode of acquiring a settlement, provided under the act of 1797. The necessary effect of this repeal was to restore the rule of the common law as to bastards. The rule is conceded by counsel and court, in *Plymouth* v. *Windsor*, to have prevailed here, and is *the principle* of that decision.

The opinion of the court was delivered by

BENNETT, J.—The marriage of Israel Sheldon with Charlotte Perry, he then having a wife living, was void, and the issue illegitimate. By the principles of the common law, it is well settled, that the place where born is the place of the settlement of a bastard child, in cases free from fraud. It seems Charlotte Perry had, at the time of the pretended marriage with Israel Sheldon, in 1807, a derivative settle-

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ment in Springfield; and she, also, gave birth to John Sheldon in Springfield, while on a visit of some three months with her friends. It is admitted that, by the principles of the common law, Springfield was the place of the settlement of John Sheldon at the time of his birth. The mother had not, at that time, gained a settlement in any other place—not in Charlotte, by means of her marriage with Israel Sheldon, as that was *void*; not in her own right in Manchester, as she moved into that place in June, 1810, and John Sheldon was born in the fall of the same year. Whether, then, the settlement of a bastard child follows the settlement of the mother, or whether it has a settlement where born, the settlement of this John Sheldon was at Springfield; and this settlement continues until another is acquired, either in his own right, or else a derivative one.

It is urged, in argument, that this child, afterwards, gained a derivative settlement from his mother in Manchester, and if not so, that he must have gained a settlement there in his own right. The act of 1797 expressly provided that the settlement of a bastard child should follow that of the mother. By the act of 1801, there is no provision as to the place of settlement of bastards; but they are left as at common law. In 1817, the subject of settlements again engaged the attention of the legislature, and in the act of that year it was again provided that the settlement of a bastard shall follow that of the mother. The question in this case is to be settled under the act of 1801. There seems no good reason to prevent Charlotte Perry from having gained a settlement in Manchester, in her own right. She was not the wife of Israel Sheldon, and she lived there more than the requisite time. Third persons in interest may well impeach, collaterally, the validity of a marriage. *Middleborough* v. *Rochester*, 12 Mass. R. 363; *Mountholly* v. *Andover*, 11 Vt. R. 226. The warning out of Israel Sheldon and his family can have no effect. In no proper sense was she a part of his family; which includes those and those only whom, by law, he was bound to support. 2 Vt. R. 158.

The question, then, returns—did Charlotte Perry communicate a derivative settlement to her illegitimate child, John Sheldon? By the last clause of the first section of the act of 1797, it is provided, "that every bastard child shall be

deemed and adjudged to be settled in the town or place of the last legal settlement of his, or her mother." By the act of 1801, the first section of the act of 1797 is repealed; and in that act there is no provision relative to the settlement of bastard children. The law of 1801 was in force until 1817, when an act was passed, which, among other things, provided that illegitimate children should have the settlement of their mother, and the act of 1801 was repealed. By the principles of English common law, it is well understood that an illegitimate child cannot obtain a derivative settlement from its putative father or its mother. But it is urged that this doctrine is unreasonable, as it may expose a tender infant to be separated from its natural mother; and this court is now judicially called upon, for the first time, to introduce, as the law of this state, the principles that have obtained in Connecticut from an early day, where, as judge Peters (6 Conn. R. 36) somewhat quaintly observes, they have discovered, that a bastard is the child of its mother, and consequently, can acquire a derivative settlement from her. But we have heard of no practical difficulties or hardships among us, arising from the principles of the common law. The same objection might be made against the principle, that, when a widow gains a settlement by marriage, her children, by a former marriage, do not follow her settlement, thus obtained, but still retain that of their deceased father.

As, with us, the law relative to derivative settlements of illegitimate children, from 1801 up to 1817, depended upon the principles of the common law, the decisions which have been made in the common law courts in England, are authorities for us, and alike binding as on other questions arising upon the common law. Besides, when the provisions of the act of 1797 were repealed by that of 1801, and, in 1817, the law was again restored, altering the rule of the common law, it is a fair inference, that the legislature contemplated the legal result, in the meantime, to have followed, (that is, a restoration of the common law rule) and that it had followed. We think it safest that we should adhere to the common law rule; and be satisfied with administering the law as we find it. It is always of dangerous tendency for a court to introduce, in their discretion, a new rule to govern the rights of parties, unknown at common law.

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It is also claimed, that, if John Sheldon failed to acquire a derivative settlement in Manchester, from his mother, he must have gained one in his own right. It seems that he lived with his mother in Manchester till he was about four years of age. In the case of *Wells* v. *Westhaven*, 5 Vt. R. 326, it was held that an infant daughter of 12 years of age, who had gone with her mother into Westhaven to live with her step-father, did not gain a settlement, under the act of 1801, by her residence there, more than a year without being warned out. The court say,—"she may be considered as going there for education." In the case before us, the child was taken to Manchester for nurture. The statute, which provided that "all 'and every person coming into, and residing within any town 'in this state, (not being warned out) should, after one year, 'gain a settlement in such town," can only include those who come to reside in the ordinary way; and to extend it to those who, from their tender years, or idiocy, were incapable of acting for themselves, would, indeed, be a strange construction. In Massachusetts they had a statute similar in its provisions, to our statute of 1801, and in the case of *Somerset* v. *Dighton*, 12 Mass. R. 383, the court held that the provision, requiring persons to be warned out, to prevent their acquiring a settlement, did not extend to minors, although illegitimate. The provisions of the Massachusetts statute are as broad as ours. The words are, "*all persons*, citizens of this commonwealth, who resided, &c." It is a common rule, relative to the construction of statutes, to give them such a construction as will best effectuate the intention of the legislature. In some cases, the letter of the statute may, by an equitable construction, be restrained, and in others, it must be enlarged; and in some instances, the construction has been contrary to the letter. We think it is quite manifest, that the general words of the fourth section of the act of 1801, though the terms, "all and every person," are used, were not intended to include persons incapable of acting for themselves, but only such as were competent to gain a settlement by residence, if not prevented by being warned out.

The result, then, to which we arrive is, that John Sheldon had not a settlement in Manchester, at the time of his death, in 1842, but still retained, up to his death, his settlement in

Springfield. By the marriage the wife acquired a derivative settlement from the husband, *Wells* v. *Westhaven*, 5 Vt. R. 325; and, upon his death, the widow and children were properly removed to Springfield.

The judgment of the county court is affirmod.

PERRY G. CARD *v.* LEONARD SARGEANT.

Notice of special matter cannot be received under a plea of *nul tiel record*.

If the facts tended to prove the issue, in the county court, the supreme court cannot inquire into their sufficiency, nor revise any decision founded upon them.

The supreme court will only pass upon such questions as are reserved by the county court; and when the parties make their pleadings, and join their issues, and take their trial in that court without objection, whatever informality there may have been in the pleadings will be understood to have been waived.

THIS was an action of debt on recognizance, commenced before a justice of the peace on the 7th of June, 1842, and brought by appeal to the county court.

The recognizance was for the sum of $50, entered into by the defendant, at the December term, 1840, of the county court for the county of Bennington, for the prosecution of a review by one Burlin Curtis, of a judgment rendered against him by said court, in favor of the plaintiff, in an action on a note for $100, upon which review there was a judgment against Curtis, at the June term, 1841, of the said court, and a final judgment against him by the supreme court, on exceptions, at the February term, 1842, for the sum of $116.22 damages, and $22.25 cost.

The defendant pleaded *nul tiel record*, with notice of special matter, proving payment and satisfaction of said judgment before the bringing of this suit. He also pleaded a special plea in bar, averring full payment, by Curtis, of said judgment, before this suit was commenced. Issue joined on both pleas; and trial of both issues by the court.

On trial, the plaintiff offered an exemplified copy of the record of the judgment, Card *v.* Curtis; and also the execution issued on said judgment, dated the 14th of February,

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1842, with the officer's return thereon, showing a levy and sale of property to the amount of $46.32, exclusive of officer's fees, and *nulla bona* as to the remainder.

The plaintiff also produced testimony to prove that, at the time of the review, the said Curtis had property sufficient to pay the plaintiff's demand, which had been disposed of before the final judgment.

To maintain the special plea in bar the defendant offered testimony, to wit, Burlin Curtis—who was first discharged from interest by the defendant—who testified, among other things, that, to secure the payment of the note described in the exemplification, he, with one Roswell Tuttle, on the 1st of October, 1839, executed and delivered to the plaintiff their joint and several note for $115.50, including the amount of the said one hundred dollar note, and interest, together with the balance of a book account then found due from him to the plaintiff; that the plaintiff then and there agreed that, on payment of the said note signed by Curtis and Tuttle, both notes should be delivered up to Curtis; that he, Curtis, insisted on some written acknowledgment of said agreement, and, on the 28th of October, 1839, the plaintiff delivered to him the following:

"I certify that Burlin Curtis has left with me a note of 'one hundred dollars, which note I say I will give up, if he 'pays me a note I hold against himself and Roswell Tuttle, 'of one hundred and fifteen dollars and fifty cents, with use, 'when called for. I say I will write to him three weeks 'before I call for the money.

'I say I will take enough of the note to indemnify me for 'coming after the money till I get it.

'Troy, Oct. 28, 1839. PERRY G. CARD."

To all which testimony the plaintiff objected; but it was admitted by the court—to which the plaintiff excepted.

The said Curtis further testified that, after the final trial in the county court in the said suit of Card against him, and before the same was affirmed by the supreme court, to wit, on the 6th of December, 1841, he paid into the hands of Serenus Swift, attorney of the plaintiff, $66.44, for the benefit of the plaintiff; which sum was, by said Swift, endorsed on the said note signed by Curtis and Tuttle; and that, on the same day they confessed judgment to the plain-

tiff, for the balance due upon said note, amounting to $65.78, and costs; that, on the 1st day of April, 1842, the said Swift took out execution on said judgment, and placed the same in the hands of an officer, who, on the 26th of May, 1842, and before the commencement of this suit, levied the same on personal property of the said Curtis, and advertised the same for sale at vendue; that said property was never sold, but that the officer suffered it pass into the hands of receiptors and afterwards brought suit upon the receipt, and collected and paid over to said Swift the full amount of said judgment against Curtis and Tuttle.

The defendant also offered in evidence the said note of Curtis and Tuttle, with the endorsement thereon, and a record of the said confession of judgment, with the execution issued thereon.

To all which testimony the plaintiff objected, on the ground that the same did not amount to proof of the full payment of the note executed by Curtis and Tuttle. The objection was overruled and the testimony admitted, to which the plaintiff excepted.

Whereupon the court found the first issue for the plaintiff, and the second issue for the defendant. The plaintiff excepted.

S. Swift, for plaintiff.

I. The issue on the first count was decided in favor of the plaintiff. The plaintiff, therefore, thinks himself entitled to a judgment in chief.

II. The different pleas are not compatible nor consistent, and if leave had been given by the court so to plead, (though it does not appear that any such was given) it would have been bad; and, although it might have been specially demurred to, yet we think it may be taken advantage of on trial, as the issues are incongruous, and cannot be tried together, and, of course, the first must decide the case. We have no statute similar to the statute of 4th of Anne, &c. 1 Sw. Dig. 169; 1 Ch. Pl. 230, 511–12; Esp. N. P. 168, 233.

III. The notice under the first plea, (if it were proper in its place, presenting matters of fact which ought to go to the jury, and could not be tried with *nul tiel record*, which is to

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be tried by the court) supersedes, and precludes the right of pleading in bar at the same time. Rev. Stat. 164, §35.

IV. The payment alleged in bar in the second plea, is of the judgment rendered in the county court, and cannot operate as a bar of the judgment we claim to have been rendered in the supreme court, and on which we rely and predicate our right or claim of recovery.

V. A discharge from bail to his principal, does not remove the interest or, at least, the bias, of the principal, or render him competent or suitable to testify in a case, ***strictly his own***, as there exists such a privity between the bail and principal, and it is even presumable that the bail has been secured by the principal, especially if he offers to discharge him.

VI. The contract testified to by Curtis, appears to have been in writing, which ought to govern and preclude parol testimony.

VII. The condition of the bond of recognizance is the payment of the additional costs and all intervening damages. If, therefore, a collateral security had been paid, it is no discharge of the bond of recognisance. Besides, the plea in this case is the payment of the judgment, and not the collateral security. The evidence produced, therefore, has no tendency either to support the plea, or prove a discharge of the bond.

VIII. Besides, the writing which purports to show the contract, and on which the defendant relies for that purpose, it appears, has once been introduced on the trial of the original suit, in which the bail was entered, and was fully and finally adjudicated upon, and ought not now to be brought up again in this collateral way, for a second adjudication thereon, and especially upon the oath of one of the parties to that contract.

IX. But if all this testimony is to be received, and have weight, it does not amount to proof of the payment of the whole note against Curtis and Tuttle, or the full amount of final judgment against Curtis, before the supreme court, including the sum collected on the execution in that case, and also the sum paid on the Curtis and Tuttle note, before the commencement of this suit—and much less the payment of the judgment itself, which has been plead.

L. Sargeant, pro se.

In the present case, the defendant deems it unnecessary to enquire beyond two points.

1. Did the plaintiff make a *prima facie* case, beyond the costs, after review, or beyond nominal damages? His exemplified record shows a blank judgment from which the review was taken, and his execution, sale, or final judgment, more than satisfied his whole bill of costs. His testimony to show intervening damages, does not show Curtis insolvent at the time of levying execution. It only proves, that personal property had passed from him; and it would have been but a fair inference for the county court, to have considered the $66.44, paid the plaintiff, December 6th, 1841, to have been the avails of the same property. Besides, on the 26th day of May following, the execution, Card *v.* Curtis and Tuttle, was levied upon the property of Curtis.

2. The case shows another and collateral security, taken for the same indebtedness, partially paid, and judgment, execution, and levy eleven days before the commencement of the suit, resulting in a final satisfaction of the whole debt, before the time of this trial. The execution expired in the officer's hands, May 30; and this suit was commenced June 6. The defendant insists that the levy of final process upon property, sufficient to make full satisfaction, is a payment, so far as the debtor, or his surety, is concerned. The plaintiff could not, after such a levy, maintain debt, or *scire facias*, upon his judgment; and should he attempt to enforce the judgment, it would be good ground for *audita querela*, or an injunction. 1 Sw. Dig. 789. It is because a levy is regarded as a satisfaction, that a writ of error will not supercede the execution after the levy. Sw. Dig. 794. The means of satisfaction are gone from the debtor, from the time of the levy; and a new security accrues to the creditor, of a higher character, to wit, the responsibility of the officer. Whether the property is held in the personal custody of the officer, or passes into the hands of the receiptors, or is squandered, is a matter beyond the control of the debtor. There are many cases where a payment is perfect, so far as the debtor or his surety are concerned, and yet, a literal satisfaction never reaches the creditor.

Should it be contended that the facts stated in the excep-

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tions should have been set out in the plea, the answer is, "That this would be pleading the evidence, instead of the fact"—of course it would be a departure from the correct rules of pleading.

The opinion of the court was delivered by

Hebard, J. — Under the plea of *nul tiel record*, the defendant gave notice that he should rely upon the proof of the same facts set up in his second plea in bar. This is a novelty in pleading, for the plea under which the defendant proposes to give this special matter in evidence, is to be determined by the court, upon an inspection of the record,—while the facts, to be given under the plea, being matter for the consideration of the jury, it would be difficult to see how that mode of defence could be available.

The plaintiff now claims that, as the court found this plea for the plaintiff, they also found the facts offered under that plea against the defendant. But we are not disposed to view it in that light. The whole case shows that no action was had upon that notice; and so far as that notice forms any part of the case, it is to be regarded as a nullity.

Upon the defendant's second plea in bar, the court rendered judgment for the defendant, which must conclude the case, unless the court committed some error in relation to the law; for this court can no more revise the judgment of the county court, in relation to matters of fact, than we can the verdict of a jury upon the same facts; so that we cannot inquire whether the court founded their judgment upon insufficient testimony, if it was legal in its character, and tended to prove the issue.

The case finds that the defendant introduced one Burlin Curtis, who testified, *among other things*, that, to secure the payment of the note, described in the exemplification, on the first day of October, 1839, the said Curtis and one Roswell Tuttle executed and delivered to the plaintiff their joint and several note for $115,50, including the amount of the said one hundred dollar note and interest, together with the balance of a book account, then and there found due from Curtis to Card on settlement, and that said Card then and there agreed that, on payment of the note signed by Curtis and Tuttle, both notes should be delivered up to Curtis.

The case further finds that Curtis insisted on some written acknowledgment of the foregoing agreement, and on the 28th day of October, 1839, the plaintiff delivered to said Curtis a paper by him signed as follows:

"I certify that Burlin Curtis has left with me a note for 'one hundred dollars, which note I say I will give up if he 'pays me a note I hold against himself and Roswell Tuttle 'of one hundred and fifteen dollars and fifty cents, with use, 'when called for.

"I say I will write to him three weeks before I call for the 'money."

To this testimony the plaintiff objected, and now asks to have the judgment reversed, because the court admitted it. The testimony of Curtis was admissible, after he was discharged of his interest, as the case finds he was. It does not appear in what way he was discharged, and, for that reason, we cannot judge of the sufficiency of his discharge.

The testimony of Curtis had a tendency to prove the issue; and his further testimony had a tendency to prove that the one hundred and fifteen dollar note was paid before the trial in this suit. What else Curtis testified to we do not know, as the case finds that he testified to these facts, "among other things." What these other things were, we have no means of knowing, or how much credit was attached to his testimony. It all seems to be a question of fact, which the court, by the agreement of the parties, have passed upon, and have found that the facts set forth in the defendant's plea in bar, are true. To say that the proof did not show a payment of the whole sum for which the defendant was liable, is to question the *intelligence* or the *integrity*, of the county court for the plea covered the whole ground, and the court found that the plea was proved. It is a question of fact, and in whichever of the particulars named, the county court might have erred, it is an error that this court cannot correct.

It is, also, insisted that there was error in admitting parol proof in relation to the agreement. The agreement was in writing, and was produced. There was proof of payment according to the agreement. This might be shown as well by parol as in any other way. And, ordinarily, there would be no other mode of proving the payment in any case.

Further objection is made by the plaintiff to the pleadings;

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but it is enough to say that when parties make their pleadings, and join their issues, and take their trial without objection at the time, there can be no question raised before this court, in relation to their informality. Under such circumstances, whatever informality there may have been in the pleadings is understood to be waived.

Judgment affirmed.

JOHN CARNEY *v.* DAVID DENNISON and DANIEL GORE.

An officer may maintain an action against a principal, for goods sold on an execution to his agent, notwithstanding his return on the execution describes the sale to have been made to the individual who acted as agent,—the agency not having been disclosed at the time of purchase.

ASSUMPSIT for goods sold and delivered. Plea, general issue.

On the trial, the plaintiff offered and read in evidence to the jury, a copy of a judgment in favor of Zacheus Walworth against Sylvester and Lund Bishop, and an execution issued thereon, with the return of the plaintiff, as a constable, on said execution, setting forth that he had levied the same, on certain property,—which he described in the return—and had sold the same to one Joel Houghton, for the sum of $390.

To establish his right of recovery for said property, against the defendants, the plaintiff then offered to prove that the said Joel Houghton acted as agent of the defendants, in bidding off the property; but that the agency was not disclosed to the plaintiff at the time of the sale. To the admission of this testimony the defendants objected, and the court sustained the objection, and rejected the testimony; to which the plaintiff excepted.

J. S. Robinson and *P. Isham*, for plaintiff.

It is claimed by the defendants, that the plaintiff is concluded by his return, endorsed upon the execution—which declares the sale to have been made to Houghton—from showing that it was made to the defendants, through Houghton as their agent. In every case, other than a bill, note or deed, parol evidence is admissible to show that a written

contract made by one as principal, was, in fact, made as agent. Ham. on Par. 59, n. 5; Chit. on Con. 105–6; *Bateman* v. *Phillips*, 15 East. 271; 7 Taunt. 295; 2 N. & P. 504. Does the return upon an execution form an exception to this rule? If so, it must be upon one or both of the following principles—either that the return contains an admission of a fact which operates by way of an estoppel *in pais*, or that parol evidence is inadmissible to contradict, vary, or add to the return. Upon neither of these principles should the evidence have been excluded. Whenever written evidence is offered as containing an admission, parol evidence is admissible to explain it, or show that it originated in mistake. 3 Stark. 1020; 8 Pick. 122.

The plaintiff might well suppose that Houghton was the principal, as he did not communicate the fact of his agency at the time of the sale. The return, therefore, originated in mistake, which the plaintiff is at liberty to show. 2 Cow. & Hill's Notes to Phil. Ev. 1091. Besides, the admission of a fact is conclusive, only, when others have been induced to act upon it, or the party making the admission has derived a credit or benefit to himself. 5 N. H. 453.

Whether parol evidence is admissible to contradict, vary or explain, the return, depends upon the question whether the return is conclusive, or only *prima facie*, evidence for, or against the officer. As a general rule the return is conclusive upon the parties in the suit; and as it respects others, it is only *prima facie*. So when the fact stated in the return comes incidentally in question. *State* v. *Daggett et al*, 2 Aik. 148. In this case parol evidence was admitted to show the attachment of a boat which the officer had omitted to mention in his return. And in *Lewis* v. *Blair*, 1 N. H. 66, the court decided that the rule, that there can be no averment against the sheriff's return, is restricted to those cases in which the evidence is offered, "for the purpose of invalidating the sheriff's proceedings, or of defeating any right acquired by means of them."

W. S. Southworth and *A. P. Lyman*, for defendants.

I. In making sale of property on execution, the officer acts as a *mere servant of the law*. This case is unlike the cases, where the officer makes a contract in relation to the sale

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keeping of the property attached, and his right to make such contracts grows out of his liability to the parties to keep the goods safely.

It is the duty of the officer to sell for cash down and not otherwise. He need not deliver the property, until paid for, and if not paid for, he may put it up again for sale. *Winslow* v. *Loring*, 7 Mass. R. 392. And if removed before payment, he may sue in trespass or trover, for removing. The creditor may sue for the money, when the property is sold, whether the officer has been paid or not. 9 Johns. R. 96. It is against policy that the officer should be permitted to create liabilities to himself for goods sold on execution.

II. If the action can be sustained, was the evidence properly excluded? The plaintiff relied upon his return to show a sale—but it shows the sale to have been made to Joel Houghton. The return of the officer is conclusive against him. 2 Phil. Ev. 326; *Gardner* v. *Hosmer*, 6 Mass. 325; *Hathaway* v. *Goodrich*, 5 Vt. R. 65; 2 Cow. & Hill's Notes to Phil. Ev. 1090. It is admitted that, to this general rule, there are exceptions; but it would seem that of all cases this should fall within the rule, as the officer is the plaintiff—introduces his return to establish his case, and thus seeks to connect the defendants with this transaction by parol evidence. *Southwick et al.* v. *Weeks*, 3 Vt. R. 49.

The opinion of the court was delivered by

Royce, J.—It is first objected to the plaintiff's right of recovery, that an officer, selling goods upon execution, is not authorized to give credit, or part with the goods until the money is paid. But it is not perceived how, under the circumstances of this case, such an objection can be made to avail the defendants. The property was received under the purchase, and it does not appear that the purchaser's title has ever been questioned. It is therefore needless to discuss the strict powers of the officer, as a mere servant or minister of the law; for if any assent of the parties in interest was necessary to render the sale valid, the case furnishes sufficient ground for implying that such assent was given.

The remaining inquiry is, whether the plaintiff was entitled to prove that Houghton, who bid off the property, was but the agent of the defendants, and made the purchase for

them. In reference to an ordinary sale, it has long been settled, that, unless the seller is apprised, at the time of the sale, that the ostensible purchaser is acting as the agent of another, he has an election, upon learning that fact, to resort for payment either to the principal or the agent. Nor is he deprived of such election by a mere notice that the buyer is purchasing for another, if the notice does not disclose the principal's name and place of residence. *Thompson* v. *Davenport*, 9 B. & C. 78. And I am aware of no recognized distinction, in this respect, between a sale at auction, whether under public or private authority, and ordinary sales.

In this instance the plaintiff had no intimation, until after the sale, that Houghton was puchasing for the defendants. Hence he was entitled to claim the benefit of the rule just laid down, unless he had precluded himself, by his return upon the execution, from proving that Houghton acted as an agent. It is held in this state, as in Massachusetts, that an officer's return of his doings, so far as it relates to acts which are strictly official, is conclusive, as between the parties to the process, and as against himself; it being thus far regarded in the nature of record evidence. But we think that no just application of the rule can extend it beyond the facts certified in the return. It has never, to our knowledge, been held to render the return conclusive as to mere inferences or presumptions upon which it was silent, though they were such as might properly arise from the facts returned. These are left to the operation of the common rules of evidence; and if, from their nature, they might ordinarily be explained or rebutted by evidence, they remain liable to be so met, notwithstanding the return. This is not to contradict the return, but merely to obviate an inference from it. We consider that, upon this ground, the evidence offered at the trial was admissible. Its object was not to disprove an ostensible sale of the property to Houghton, (and that was all that the return expressly alleged) but to show the capacity in which he acted in relation to these defendants. It would be inferred from the return, in the absence of other proof, that Houghton purchased in his own right; and to repel that inference the evidence was offered.

If it be said that the effect of the evidence would be to

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make out a contract of sale between the plaintiff and these defendants, and that this is inconsistent with the language of the return, it may be answered, that such is the effect, and seeming inconsistency, in every case of sale to the agent of an unknown principal, against whom the seller afterwards seeks redress. In such a case there is never any credit originally given to the principal, nor any contract intentionally made with him; for the very statement of such a case excludes the possibility of either. Yet, for the sake of justice, the law permits the seller to transfer the credit, and the obligations of the contract, from the person who actually contracted, to him for whose use and benefit the contract was made. The election of the seller to do this is justified, as against the principal, by the legal maxim, that what a man does through the instrumentality of another is deemed to be his own act; and his election not to do it, but to hold the agent liable, is justified, as against the latter, on the ground that in making the contract, he wrongfully concealed his principal.

As, in our opinion, the county court erred in rejecting the evidence offered, the judgment below must be reversed.

SAMUEL COGGSWELL *v.* AMY BALDWIN.

Whether an action is *trespass*, or *trespass on the case*, is to be determined from the facts alleged in the declaration, and not from the name given to the action.

The owner of a cow, accustomed to hook—the vicious propensity being known to her owner—is liable for damage done by her, although it be done in the highway against the land of her owner, and while going to her usual watering place.

If the injury, in such case, is occasioned by the negligence of the owner of the animal injured, he will not be entitled to recover.

THIS case was brought by appeal from a justice of the peace. The declaration, in the original writ, was in a plea of "*trespass*," in which the plaintiff proceeded to allege that the defendant was possessed of a cow accustomed, and known by her to be accustomed, to hook, which she suffered to go at large, and which, while thus at large, hooked the plaintiff's horse so that he died.

On the entering of the appeal in the county court, the plaintiff offered to file a declaration in a plea of "*trespass on the case*," followed by the same allegations as in the original writ—to which the defendant objected, as being variant from the original declaration;—which objection was overruled by the court.

Plea, general issue, and trial by jury.

Upon the trial, testimony was introduced tending to prove that, on the 20th of February, 1841, the defendant was the owner of a cow which, some three years before that time, had hooked a horse, which was known to the defendant, and that buttons had afterwards been put upon the cow's horns. There was no evidence that the cow had ever been known to hook any other animal except the horse referred to, until the 20th of February, 1841; but there was evidence that the defendant had been heard to say, when horses were around, that they ought to be taken care of. There was, also, evidence tending to prove that, on the said 20th of February, 1841, about 3 o'clock, P. M., said cow, with several other cows of the defendant, were in the highway, nearly opposite the defendant's barn-yard, a short distance from their usual watering place, which was a stream crossing said highway; that the bars opening from said yard into the highway had been let down, and that defendant owned the land on both sides of the highway; that the horse in question was a fat, wild, and spirited animal, nearly two years old, and sufficiently broke to lead and drive in harness; that the plaintiff's son had taken him about a mile from the stable where he had been kept, for the purpose of trying how he would match with another; and, after he had done, he took the halter from him and turned him loose, for the purpose of driving him home, as the halter belonged to the man living where the horse was let loose; that he was followed by the plaintiff's son, but started away from him and ran rapidly the distance of 100 rods, and was out of sight for the period of five minutes, and while he first passed said cows; that, after passing them, he returned among, and by, them, and while passing the cow in question, and in the road, she pitched at him and hooked him, so that, of the wound made by such hooking, he died.

Hereupon the defendant requested the court to charge

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the jury, that, if they should find that the cow was in the highway, on the way to her watering place, and on the land of the defendant, under the circumstances above stated, it was not such an act of negligence on the part of the defendant, as to make her liable for the act of mischief done by the cow, even though it might have been then known to the defendant that the cow, before this, had hooked horses.

The defendant requested the court further to charge the jury, that, if they found that the horse was of the character testified to, and that known to the plaintiff and the plaintiff's son, the turning of him loose, and suffering him to make his way home under the circumstances stated in evidence, was such an act of negligence on his part as to prevent him from recovering in this action, for the act of the cow, even though the defendant might have been guilty of negligence in permitting the cow to be in the highway.

The court refused so to charge the jury, but charged that, if they should find that the cow had, before that time, hooked horses, and that this was known to the defendant, it was the duty of the defendant to restrain the cow, so as to prevent her from doing like mischief; that, if the accident was occasioned by the negligence of the plaintiff, he could not recover; but whether the turning of the horse loose under the circumstances, was an act of negligence on the plaintiff's part, was a question of fact for the jury and not for the court; that the court did not consider it such an act of negligence as to prevent a recovery; but of this the jury were to form their own opinion, from the evidence, and be governed by their opinion and not by that of the court.

To which charge, and refusal to charge, as requested, and the admission of said new declaration, the defendant, after verdict for the plaintiff, excepted.

D. Roberts, jr., for defendant.

I. Was it competent for the court to allow the filing of the new declaration?

One objection is, not that *the cause* of action set forth in the two declarations is different, but that the new declaration is variant from *the writ*, and thereby *the form* of action is changed. These words, *trespass*, and *trespass on the case*, have a meaing purely technical. The declaration accompa-

nying the writ, as our practice is, gave the action no other name than that given in the writ, to wit, a plea of trespass. The words "for that," were used in the declaration in setting forth the injury, instead of the words "for that whereas," which last are the distinguishing ear-mark of the action upon the case. Ham. N. P. 22.

But the writ was the foundation of the action. It has never been amended, and could not be by the county court, for it was not before them. The action there was trespass, and the court permitted it to be changed. "When the title 'of the writ is of one form of action, then the declaration 'can never change it to another, for the declaration is but 'an exposition of the writ, and must, therefore, agree therewith." Bac. Ab. Pleas and Pleadings, (B.) 4; 3 Bl. Com. 293. "It is the writ which gives the court au-'thority to proceed in any suit." Gould's Pl. 270. In *Rogers* v. *Rogers*, 4 Johns. R. 485, the *ca. ad. resp.* contained an *ac etiam* clause upon promises for 500 dollars, and the declaration was in account. In *Durfee* v. *Heemstreet*, 1 Wend. R. 305, the *ac etiam* clause in the capias was in trespass, for entering the close of the plaintiff, and debauching his daughter. The plaintiff declared in case; and, after default entered, the proceedings were, as in the case above, upon motion, set aside for irregularity.

In England, in bailable actions, the declaration must correspond with the cause and *form* of action in the *ac etiam* part of the latitat, or other process, or the defendant will be discharged on common bail. 1 Ch. Pl. 254. The reason that no other effect is given to the variance there, is found in the constitution of the English courts—to sustain a jurisdiction which was originally an encroachment, leading to the establisment of a rule, that the defendant, once in the custody of the court upon a fictitious cause of action, may be declared against in any other action. *Vide* 3 Bl. Com. Ch. 4 *passim*. A further reason is found in a rule of those courts, whereby the writ is treated as no part of the record, nor can it be made so, even upon oyer craved. 1 Wms. Saund. 318, n. 3; *Emerson* v. *Willson*, 11 Vt. R. 359; *Davis* v. *Owen et al.* 1 Bos. & Pul. 342.

In debt on statute for a penalty, where part is given to an informer and part to the king, the declaration need not state

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that the plaintiff sues *qui tam*, &c., 1 Ch. Pl. 356, unless the writ be so; but if the writ be so, and the declaration is in his own name only, the proceedings will be set aside for the variance. *Canning* v. *Davis*, 4 Burr. 2417.

"It has been frequently decided in this state, and may be regarded as a settled rule of law, that an amendment cannot be granted, which changes *the form* of action;" Prentiss, J. in *Carpenter* v. *Gookin*, 2 Vt. R. 495, in which case the court cited, approvingly, *Haynes et ux.* v. *Morgan*, 3 Mass. R. 208, where Parsons, C. J. says, "to alter a plea of *the case* to a plea of debt or *trespass*, is not within the discretion of the court." "An amendment cannot be granted which changes *the form* of the action;" Mattocks, J. in *Bucklin* v. *Ward*, 7 Vt. R. 197. "Allowing an amendment which changes entirely the *form* of action is error;" Williams, C. J. in *Emerson* v. *Willson*, 11 Vt R. 359. "A court may, in its discretion, allow amendments in a declaration, which do not change the *form*, or nature of the action, &c;" Collamer, J. in *Skinner* v. *Grant*, 12 Vt. R. 462; 1 Sw. Dig. 639.

We find, then, no rule less rigid than this—that the form of action given in the writ, shall not be changed. It has the advantage of certainty, which is much. It should be inflexible, or it is nothing. Why not change trespass *de bonis asportatis*, in the writ, to trover in the declaration? Why not trespass to case, and assumpsit to trover, as was attempted in *Durfee* v. *Heemstreet*, and *Carpenter* v. *Gookin*? Because of the rule. Inflexibility, and hence certainty, is its chief virtue.

II. We regard the charge of the court, as to the duty of the defendant in restraining the cow, to be erroneous in two aspects.

1. In charging that this duty arose from the defendant's knowledge that the cow had, three years before, under some circumstances, not detailed, hooked a horse, instead of the defendant's knowledge that the cow was *used and accustomed* to hook horses. So are all the precedents. *Buxendin* v. *Sharp*, and *Jenkins* v. *Turner*, 2 Salk. 662; 8 Went. Pl. 437, 581; 2 Ch. Pl. 288–9; *Jones* v. *Perry*, 2 Esp. R. 482; *Vrooman* v. *Lawyer*, 13 Johns. R. 339; and so is this declaration. The action lies not, unless the owner have

previous knowledge of the animal's "mischievous *propensity*." 1 Ch. Pl. 69.

2. The charge implies, that the defendant was to be treated as an insurer against the acts of the cow; the words of the charge being, "it was the duty of the defendant to restrain the cow, *so as to prevent her from doing like mischief*." This complaint comes under the head, in Com. Dig., of "Action upon the case *for negligence*."

As to the *scienter*—that is material, only because, without a knowledge of the mischievous propensity of the animal, negligence in restraining it, could not be predicated of the conduct of the owner. With such knowledge, the legal obligation so to deal with the animal as, *in all reasonable probability*, to prevent the doing of accustomed mischief by it, would arise. But the character and degree of the requisite cautionary dealing would necessarily vary with the *species*, and the particular character of the individual animal, and all the probabilities of mischief being done in a particular case. In every case, therefore, it must be a question whether, under the circumstances, *due diligence*, has been used to prevent a probable mischief. This is a question of fact for the jury, as was decided in another part of the case, but in this, the court decided it as a matter of law.

H. Canfield, for plaintiff.

1. The amended declaration neither changed the form of action nor introduced a new cause of action. In the original writ, though the action is called trespass, yet the cause of action is set forth in the form of an action on the case, and with all the technical accuracy necessary to describe the injury in that form of action. The injury is alleged to have been consequential, and not *vi et armis* and *contra pacem*,—both of which are necessary in actions of trespass. 1 Ch. Pl. 135, 171. The scienter of the defendant, of the cow's malicious propensity, is also alleged. 1 Ch. Pl. 70.

The omission of the words, "on the case," after the word trespass, was evidently a clerical error. The county court, therefore, could, in their discretion, allow or reject the amendment; and their decision cannot be reversed by this court. 2 Aik. R. 276; 2 Vt. R. 495; 7 Vt. R. 195.

2. Such law as is contended for by the defendant, would

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not arise from the facts, if the evidence is to be believed; and the charge must have been against the defendant; consequently a refusal to charge as requested, is not error. 5 Vt. R. 136; 2 Vt. R. 314. The requests to charge present questions of negligence, which are questions of fact, for the jury. 3 Stark. Ev. 993, n. o, and the cases there cited; 6 Vt. R. 245. They, at least, involve questions of fact; and if of a mixed character, are proper for the jury. 3 Stark. Ev. 1243; 5 Vt. R. 97.

If the defendant had a right to suffer her cattle to go into the highway for the purpose of watering, she could only do so in a manner consistent with the right of others, to use it as a public easement, although she owned the soil. 3 Kent's Com. 427; Sw. Dig. 106. Permitting the cow so to do, was in contravention of this principle, as well as of the doctrine that owners of cattle are liable for injuries done by them, if they have notice of their mischievous propensity, unless caused by the neglect of the party injured. 1 Ch. Pl. 70, 167.

The opinion of the court was delivered by

HEBARD, J. — By our statute, the plaintiff, at the time he sues out his writ, is required, also, to make out his declaration of his claim, which goes along with the writ; and this, of course, must determine the nature of the action. If it were usual or allowable for the plaintiff to call the defendant into court, by merely stating the *name* of the action, without making any statement or specification of his claim, there would be more propriety in regarding the name, alone, as of some importance. The reason for having the cause of action declared and set out, is, to give the defendant notice of what is to be preferred against him; and, that being done, there is no principle of law better settled than that he cannot afterwards change the *form* of action. The authorities are full on this subject. But the action, and consequently the *form* of it, depends much more upon the matter alleged and set forth as the ground of the claim, than upon the mere *name* that happens to be given to it.

In *Carpenter* v. *Gookin*, 2 Vt. R. 495, the court say that "as a description of the matter of demand, or cause of action, so far as to specify the general nature of the action,

is all that is usual, or necessary in a suit before a justice of the peace, the plaintiff is at liberty, when the cause comes by appeal to the county court, to file a declaration in proper form, upon the particular cause of action, described or specified in the writ." In this case, and in a number of other subsequent cases, in this state, the "*nature of the action*," and the "*cause of the action*," and the "*form of the action*," are indiscriminately spoken of when discussing this question; but in no case, I believe, is any thing said about the *name* of the action.

Swift in his Digest, page 639, uses similar language. He says, the plaintiff may amend, "provided he does not change the *form* or *ground* of action."

Cowen's Treatise, 333, is full on this point. It is there laid down that "the cause of action, stated at length, shall be deemed the true one," and not the *name* by which it is called. In this case, the plaintiff, in his original declaration before the justice, commenced his declaration by stating, "in a plea of trespass," and then proceeded to state the ground of his complaint, in such a way as did not admit of its being trespass, — in other words, he so stated it as to make it *trespass on the case*. No act is alleged against the defendant, only a neglect, or an omission to do that, which, if it had been done, the plaintiff would not have sustained the injury. The new declaration which he filed in the county court, counted upon the same facts as the original declaration, and recited the same transaction, and nearly in the same words, in the most important parts.

It could not, then, be changing the *cause of action*, or the *form of action*. This disposes of all there is objectionable in the declaration.

The next objection is to the charge of the court.

On the trial in the county court, the defendant requested the court to give the jury certain instructions in relation to certain negligences of the plaintiff, on account of which, he was not entitled to recover; and upon this request to charge the jury, and refusal to charge as requested, the defendant excepts, and not from the general charge of the court, in relation to the plaintiff's right to recover, nor from a charge given at the request of the plaintiff. This is important to be noticed in considering the case. If the court had been request-

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ed to charge the jury in relation to the extent and nature of the *evil propensity* of the cow, and the extent of the defendant's knowledge of that propensity, we might suppose that all that is detailed in the bill of exceptions, is all that was said upon that part of the case. From what comes to us in the bill of exceptions, it will be seen that the defendant was raising no question in relation to the evil propensity of the cow, nor of defendant's knowledge of that propensity, but it was in the first place, that defendant was not liable on account of the place in which the injury was sustained, and, in the next place, that the injury happened through the negligence of the plaintiff, and that the defendant, therefore, was not liable. But we think the defendant was not entitled to such a charge upon either of these points. If the cow had this *vicious habit*, and this was known to defendant, it was her duty to have restrained the cow, — and, in regard to the question of negligence on the part of the plaintiff, that must depend upon the attendant facts and circumstances, and was properly submitted to the jury. It will be noticed that so much of the charge as is set forth in the bill of exceptions, is in relation to the request of the defendant, relative to those points already stated, but does not pretend to be a statement of the charge of the court, in relation to what was necessary to have been proved by the plaintiff, in relation to the *mischievous propensity* of the cow, nor of the defendant's knowledge, — and what the charge of the court was, in relation to that part of the case, does not appear, excepting what is incidentally stated in the other part of the charge: — and we perhaps, would be justified in presuming that the charge in that respect, was unobjectionable, or the defendant would have excepted to it at the time.

The case finds that the cow, on one occasion, had hooked a horse, and that was known to the defendant, and she caused buttons to be put upon her horns, as a preventive. Only one act of hooking, before the one complained of, was proved. Still, others might have existed,—and how far the circumstances tended to prove it, or would authorize a jury to arrive at that conclusion, is not for this court to say. It is enough to say that they might have that tendency.

But, taking the charge of the court upon the *mischievous propensity* of the cow, as it has come to us, we discover

nothing erroneous in it, although it might have been more full. It is evident the court did not intend to rest it upon a single act of hooking, for, when speaking of hooking horses, the court used the expression in the plural number, and did not confine it to a single instance.

Upon the whole, we are satisfied with that part of the charge to which the defendant excepted; and in relation to the other, if we are at liberty to revise it, without its being excepted to, we are not convinced, from what appears in the case, that there was any error.

Judgment affirmed.

WINDHAM COUNTY.

FEBRUARY TERM, 1843.

PRESENT HON. CHARLES K. WILLIAMS, *Chief Justice.*
" MILO L. BENNETT, } *Assistant Justices.*
" WILLIAM HEBARD, }

CHARLES KIMBALL & CO. *v.* GATES PERRY, JR.

When a deputy sheriff sold goods on execution, on a credit of three months, by direction of plaintiff's attorney; — *Held*, that the sheriff was not responsible for his neglect to return the execution, &c., as he did not act officially.

The attorney of record of the plaintiff may, when the plaintiff lives at a distance, give such instruction to an officer as he thinks the interest of the client requires; and his directions to the officer, when he gives him an execution, in what manner to execute the same, will bind his client.

THIS was an action brought against the defendant, sheriff of Windham county, for the default of Eli B. Russell, his deputy, in not serving, collecting, and returning an execution in favor of the plaintiffs against one Daniel Upton, which had been put into his hands for that purpose. Plea, not guilty. Issue to the country.

On trial in the county court, the plaintiffs gave in evidence a regular attachment in their favor against said Upton, returnable to the April term, 1840, of Windham county court, which was duly served on the 16th day of March, 1840, by attaching the goods of Upton, subject to certain prior attachments; and being duly returned to said court, the plaintiffs perfected their judgment and took out an execution thereon, dated the day of April aforesaid. The plaintiffs then gave evidence tending to show that they seasonably put said execution into the hands of said Russell, who was, at that time, a deputy of the defendant.

The defendant gave in evidence, on his part, the said prior attachments of the other creditors of Upton—the judg-

ments rendered thereon, and the executions taken out upon the same, together with the execution in favor of the plaintiffs; by which it appeared, from a minute made by said Russell on each, that he received the same, as deputy sheriff, on the 25th day of April aforesaid, and made his return thereon, that he levied the same on the goods attached as aforesaid.

The defendant then offered testimony tending to show, that, at the time said executions were delivered to said Russell, he was directed by the other creditors, and by N. T. Sheafe, the attorney of record of the plaintiffs, whose name was on the back of their execution, as such attorney, to levy on said goods, and having duly posted the same, to sell the same on a credit of three months for all sums over five dollars, and that he did levy and sell accordingly; and that, in pursuance of such direction, he did sell the goods on such credit, to divers persons at Bellows Falls, and in the towns adjoining thereto; and he was then directed to go round to the several persons to whom the goods were sold, and take their notes therefor; that, after selling for about six days, the vendue, by the direction of Mr. Sheafe, as attorney as aforesaid, and by direction of the attorneys for the other creditors, was again adjourned for one month, and, at the time to which the vendue was adjourned, he again sold on like credit, and again went round to the several persons to whom the sales were made, and obtained their notes for the amount of their bids. To this testimony the plaintiffs objected; but the court decided that it was proper to be admitted, and, if believed by the jury, that the plaintiffs ought not to recover; whereupon the plaintiffs entered a nonsuit, with leave to move the court to set the same aside and for a new trial, on account of the decision aforesaid; — and the plaintiffs afterwards made their motion accordingly; but it was decided by the court that the motion should not be granted, but that the said nonsuit should stand; and thereupon the court rendered judgment for the defendant. The plaintiffs excepted.

W. C. Bradley, for plaintiffs.

The plaintiffs contend that a new trial ought to be granted because the facts stated were not a sufficient bar to their action.

WINDHAM, *February*, 1843.

Kimball & Co. v. Perry.

The delivery of the writ to the deputy; the receipt by him, as such; the levy, sale, and adjournment, were all regular and took place within the life of the execution.

1. The direction to sell *on credit* was not an act which divested the deputy of his official character, as representative of the sheriff, and converted him into the agent or broker of the plaintiff; for such sales are usual, beneficial, and of injury to no party. At most, they amounted to a consent of the plaintiffs to receive the securities taken for the sales, in lieu of money; and it was the duty of the deputy, before he parted with the goods, to have taken such securities. If he omitted this, and, by the plaintiffs' consent, advise, or even direction, still effected it within the life of the execution, the relative situations of the parties were not changed. He could not keep the securities on his *private* responsibility. And what becomes of the sales for sums less than five dollars?

In Massachusetts, where a writ was filled up provisionally, and delivered to a sheriff, with instructions not to serve till a certain time or contingency, the action was held not to have been commenced till the time of service. *Seaver* v. *Lincoln*, 21 Pick. 217. So in the cases which have occurred in this state, where the sheriff was decided not to be holden, it does not appear that they were absolutely received by the officer as such, for in *Strong* v. *Bradley*, Sheriff, 13 Vt. R. 9, he was in the first place, to exercise his discretion, whether he should serve, i. e. take the execution, as deputy sheriff, and execute it. So in *Fletcher* v. *Bradley*, sheriff, 12 Vt. R. 22, the sheriff was to manage discretionarily, and being either unwilling or unable to get collateral security as an agent, he proceeded to act as an officer, and executed his writ. In the present case, the deputy performed every essential act, as an officer; and to view him in any other light would make his levy and sale tortious, especially as no consent of the original debtor is shown.

2. If these directions were out of the regular course of proceeding by the sheriff, and would, if given by the plaintiffs, have discharged him, then we say, they were out of the course of regular proceeding by the attorney, acting under his general character, and could not bind the plaintiffs. There is no question, at this time, how far an attorney at law has authority to appeal, discontinue or manage the suit of

his client according to the forms and usages of the court, until he obtains a judgment. His authority in regard to the execution, is to have it collected in a legal way; but he cannot cancel it in payment of his own debt. *Smock* v. *Dade*, 5 Rand. 639. He cannot, without the *manifested* consent of his client, discharge it for less than its face; *Lewis* v. *Gamage*, 1 Pick. 347; 5 Pet. 113; nor release the sureties of his client's debtor; *Givens* v. *Briscoe*, J. J. Marsh's R. 532; nor appoint an appraiser on the execution; *Dodge* v. *Prince*, 4 H. R. 191; nor receive a bond from the debtor in discharge; *Kirk* v. *Glover*, 5 Stew. & Port. 35; nor make his clients the bailiffs of their debtors, by receiving on the execution securities to collect, and thereby render them liable to an action of account; *Langdon* v. *Potter*, 13 Mass. 320. What his known official character does not authorize him to do, the sheriff cannot take advantage of against his client; and if the attorney at law direct the sheriff to discharge the debtor from custody, without any satisfaction or consent of the plaintiff, that officer, by knowingly doing so, becomes liable for an escape. *Kellogg* v. *Gilbert*, 10. J. R. 220; *Crary* v. *Turner*, 6 Id. 51.

As to not returning the execution, see also C. L. R. vol. 37, p. 206; *Holmes* v. *Clifton*, A. & E. 673.

A. Keyes, for the defendant, said there were two questions presented in the exceptions—1. Had the plaintiff's attorney power to direct the deputy to sell on credit? 2. Did such direction exonerate the sheriff?

As to the first point, he maintained that the latitude of the attorney's discretion is greater in relation to foreign, than other demands. In regard to the extent of his discretionary power, in various particulars, he cited 6 Johns. R. 53; 2 Ld. Ray. 1142; 1 Salk. 70, 89; 1 Bac. Ab. 299; Carth. 417; *Gorham* v. *Gale*, 7 Cow. R. 739; *Lynch* v. *Commonwealth*, 16 S. & R. 368; *Ewin* v. *Blake*, 8 Peter's R. 18; *Gray* v. *Was*, 1 Greenleaf, 257; *Crooker* v. *Hutchinson*, 1 Vt. R. 73; *Briggs* v. *Georgia*, 10 Vt. R. 70; *Crooker* v. *Hutchinson et al.* 2 Chip. R. 117; *Halker* v. *Parker*, 7 Cranch. 436.

He justified the discretion exercised in this case, by the considerations that the client resided at a distance, and that

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there were a number of attachments, previous to his, upon the property, with little prospect that it would reach his client's execution, unless he gave the directions he did in regard to the time and manner of sale.

Upon the point, whether the attorney's directions exonerated the sheriff, he maintained that the sheriff is responsible only for the *official* acts and neglects of his deputy; Rev. Stat. 73; 4 Mass. R. 63;—and that when the deputy undertakes, by direction of plaintiff, to do official business contrary to the course prescribed by law, he is, *pro hac vice*, divested of his official character, and becomes the servant and agent of the plaintiff; 2 Esp. 591; 4 Term. R. 119; 4 Mass. 63;—and that, therefore, when plaintiff gives the deputy special instructions to sell upon credit, the sheriff is not responsible. To this point he cited *Gorham* v. *Gale*, 7 Cow. 739; *Marshal* v. *Hosmer*, 4 Mass. 63; *Walden* v. *Davidson*, 15 Wend. 579; *Cook* v. *Palmer*, 6 B. & C. 739; 7 D. & R. 133; *Fletcher* v. *Bradley*, 12 Vt. 22; *Downer* v. *Bowen*, 12 Vt. 453; *Strong* v. *Bradley*, 13 Vt. 9; *Porter* v. *Viner*, 18 Ch. 177.

He further maintained, that the allegations in the plaintiffs' writ were not sustained. It was alleged that the execution had been delivered to be executed, in due form of law, when the case showed that it was delivered to be executed, not according to law, but according to direction of the plaintiffs. It was alleged that the deputy made no return of the execution according to the precept thereof; but a plaintiff can recover no damage for non-return of an execution, when, by his own direction, he, in effect, releases the sheriff from making a return. It was alleged that the deputy never caused said sum, or any part thereof, to be paid to the plaintiffs. But for this the sheriff was not responsible. His deputy was directed to receive notes for the goods; and whatever responsibility existed for not collecting and paying over their amount, was the responsibility of the deputy as plaintiffs' agent, and not of the sheriff as for his official neglect.

The opinion of the court was delivered by

Williams, Ch. J. — In this case it appears, that after the plaintiff had made out a *prima facie* case, the defendant offered certain testimony, which was objected to. The court admit-

ted the same, and declared their opinion of the effect of it. The plaintiff then submitted to a nonsuit. No other state of facts are now to be considered, than those presented to the court at the trial. The plaintiff was not compelled to submit to a nonsuit, but was at liberty, after the testimony was admitted, to offer evidence of any other state of facts which might take his case out of the law as supposed in the opinion of the court. The object of exceptions is to bring before this court, the decision of the county court, on any question of law decided by that court; and they should be so drawn as to present those questions, and none other; and it is not to be expected that any questions are to be raised in this court which did not arise in the county court on trial, or that the exceptions should be so guarded as to exclude every possible conclusion which might be drawn from them.

The questions in the present case are, whether the defendant, as sheriff, is liable for the acts of his deputy, Russell, done under the instructions he received; and, whether the attorney of the plaintiff was authorized to give those instructions.

The sheriff is made liable only for the official acts and neglects of the deputies, and he is authorized to take bonds of indemnity of his deputies against their official misfeasances and nonfeasances. If the defendant is liable in this case, the sureties of Russell, the deputy, are responsible to him; and sureties are only held responsible according to the letter of their undertaking, which, in the present case, is only for the official acts, &c., of the deputy.

The duties of a sheriff, in the collection of executions, are pointed out by statute. He is to sell for money, and not for any other pay. He is to sell for cash, to be paid on delivery of the articles sold. Credit is unknown in the statute in sales by virtue of an execution. Hence there is no accountability for the value, or expense, of keeping property, as there would be, if he was directed to sell for collateral or specific articles, — no accountability for the responsibility of the persons to whom sold. No questions can arise, whether he conducted prudently in delivering the property sold without taking adequate security;—whether he was faithful in collecting, or what should be his compensation therefor. The risk is very trifling, when the sales are for cash, and

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the creditor, as he usually is, is ready to receive the avails, as soon as the sales are perfected. But the risk is very great if the sheriff, or the sureties of the deputy, are to be held responsible when the sales are made in any other way.

The language of the American and English authorities is explicit on this subject. In the case of *Marshal* v. *Hosmer*, 4 Mass. R. 60, Parsons, C. J., said, a sheriff was not responsible for the act of his deputy, when the latter acted under a contract obliging him to do what, by law, he was not obliged to do. The same idea was repeated in the case of *Bond* v. *Ward*, 7 Mass. 129. The case of *Gorham* v. *Gale*, 7 Cow. 739, and *Walden* v. *Davidson*, 15 Wend. 579, are almost identical with the case under consideration. The cases of *Cook* v. *Palmer*, 6 Barn. & Cres. 739; *Porter* v. *Viner*, 1 Chitty's R. 613, *in notis*, are equally explicit. The subject has been under consideration in the courts of this state. The case of *Fletcher* v. *Bradley*, 12 Vt. R. 22, and the case of *Strong* v. *Bradley*, 13 Vt. R. 9, are authorities directly opposed to the plaintiffs' maintaining this action. The case of *Strong* v. *Bradley* again came before this court in 1842, and the court held that the letter of the attorney, mentioned in the case, did, *ipso facto*, discharge and release the sheriff from any liability. We do not perceive that the case of the *N. H. Savings Bank* v. ————, 1 Metcalf, 34, which has been sent to our room since the recess at noon, and but a short time before we came into court, contravenes the authorities. The deputy had, there, attached certain goods, subject to prior attachments. Under a statute of that state, similar to ours, with the consent of the creditor and debtor, he was authorized to sell the property attached, and hold the proceeds to be applied on the execution, instead of the property. The statute directed the sales should be made as on executions, — that is, at public auction. The creditors and debtors agreed the sales might be at private sale and public auction. The deputy sold partly at private sale and partly at auction, and neglected to pay over the money on the executions; and it was held the sheriff was accountable. In that case, the duty of the deputy was plain to expose the goods to be taken in execution; or, if he had received the value, to pay over the same. The court, however, in deciding that case, intimated that, in selling at private

sale, the deputy acted as the agent for the creditors, and had paid to the prior attaching creditors an amount equal to what he had received at *private* sale, and said he had sold, at public auction, enough to satisfy the plaintiff in that case. If, however, the decision was directly on the point involved in the case before us, its authority could not be recognized, as we conceive it would controvert all the cases in New York, in this state, and in England, to which I have referred.

This view of the case answers all the exceptions. There was no offer to prove that the deputy had received any money, by the sales, under five dollars, unaccounted for; and his not returning the execution was consistent with the instructions he received. In short, it cannot be contended that he acted partly as deputy sheriff, and partly as agent for the creditors. As Russell, the deputy, did not proceed in the ordinary line of his duty, but deviated therefrom, and proceeded in a way not known to the law, by the direction of the plaintiffs' attorney, the defendant cannot be held accountable, unless he should be considered as unjustifiable, in consequence of his deputy's pursuing those instructions.

A question is, then, raised whether the attorney, Mr. Sheafe, was authorized to give those instructions. Of the authority of an attorney to give such instructions, at the time he gives to the sheriff executions, and the duty of the deputy to follow them, unless notified to the contrary by the creditors, we have no doubt. An attorney, employed to collect a demand when the creditor lives at a distance, and cannot be consulted, combines the character of agent and attorney. This was recognized in the case of *Briggs* v. *Georgia*, 10 Vt. R. 70. In the absence of his employer, he may pursue such a course as is apparently for the interest of his employer, and such as he would probably direct, if present. *Crooker* v. *Hutchinson*, 2 D. Chip. R. 117, and 1 Vt. R.73. The attorney may direct on what property an execution shall be levied — whether on land or personal property; and that he may give instructions in relation to the levy, sale, and service of the execution, appears from the cases of *Gorham* v. *Gale*, 7 Cowen, 739, before mentioned; *Porter* v. *Viner*, 1 Chitty, 613, and *Strong* v. *Bradley*. Indeed, some of these cases may be considered *ad idem* with the present. The interest of the plaintiffs was undoubtedly considered, as

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there were several attachments prior to theirs, and the sales on credit afforded the fairest prospect of their realizing the debt. It is not said, or pretended, that the attorney acted contrary to any direction, instruction, or wishes of the plaintiffs; but he acted in common with the other creditors. The execution was not discharged by giving those instructions; and the only effect was, that the plaintiff must resort to the deputy, and not to the sheriff, to recover whatever money, notes, or other securities, he may have received on those sales. Russell received the notes and securities as agent for the creditors, including the plaintiffs, and is entitled to a compensation for his services in his agency, to be adjusted in a suit between him and the creditors; but as he was directed to deviate from the course prescribed by statute, by the attorney having authority to give those directions, the defendant is not responsible.

The judgment of the county court is therefore affirmed.

OLIVER P. NEWELL *v.* EPHRAIM INGRAHAM, Jr.

L. having a contract for carrying the mail, and having contracted with N. to carry the same for a stipulated sum, transferred to I. the right to receive from the Post Office Department a part of the money to become due for the transportation, reserving to N. a certain portion thereof; whereupon I. requested N. to carry the mail for him, and promised to see him paid. The contract between L. and N. remained unrescinded and uncancelled. Held, that the promise of I. was within the statute of frauds.

THIS was an action of book account. There was a judgment to account, and reference to an auditor. The auditor reported that the plaintiff exhibited the following account.

Ephraim Ingraham, jr., To Oliver P. Newell, Dr.
January 1, to July 1, 1841.

To carrying the U. S. mail from Cambridge Port Vt. to Londonderry, Vt.	$50
Cr.—By cash,	36
	$14
Interest on balance,	1.05
	$15.05

The auditor found, and reported, — That Simeon Leland had a contract with the United States for carrying the mail on the above route, and that, on the 1st of July, 1840, he made a contract with the plaintiff to carry the mail on said route for one year from that date, for the sum of $100, to be paid in quarterly instalments; that, on the 13th of November, 1840, Leland, in consideration that the defendant had become surety for him, transferred to the defendant, by an instrument in writng, the right to receive from the post-office department the sum of $60, out of the money Leland was to receive for carrying the mail, the last two quarters of the year commencing July 1, 1840, reserving $50 to pay the plaintiff for the carrying of the same, said last two quarters; that, in the month of December, 1840, the defendant notified the plaintiff of said transfer, and requested him to carry said mail for him, on the same conditions on which he was to carry it for Leland, and promised to see him paid; that the plaintiff carried the mail to the end of said year, and had received but $36 therefor, which had been paid him by Leland, upon the application of the defendant; that no part of the said sum, assigned by Leland to defendant, ever came into the hands of the latter, but that the whole or nearly the whole amount for carrying said mail, had come into the hands of Leland, who retained it; and that the contract between Leland and the plaintiff was never cancelled, and no conversation was ever had between them about the discharge of either of the parties from their liability thereon, and that Leland relied upon said contract, as security for the carrying of said mail, by the plaintiff.

The auditor thereupon reported, that the said promise of the defendant to the plaintiff, came within the statute of frauds, and that the defendant recover his costs; but he further reported that if the court should be of opinion that the promise did not come within said statute, then he found for the plaintiff, the sum of $15.05, to balance, &c.

Upon the coming in of this report, the county court adjudged the said promise to be within the statute of frauds, and that the defendant recover his costs, — to which the plaintiff excepted.

——— ———, for plaintiff.

It is to be observed that, in the case of *Barber* v. *Fox*, 1

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Stark. 270, (2 E. C. L. R. 386,) which has been heretofore relied on, the very bill of services for which the action was brought, was made out against the original promissor, as appears by the statement of Ld. Ellenborough, in giving his opinion; and in *Sinclair* v. *Richardson*, 12 Vt. R. 33, the promise was, to pay for past as well as future labor, materials, &c.; so that, in both cases, it was an undertaking for the debt of another. In this last case, the English criterion was adopted, viz., whether the credit was given to the first or last promissor; and this was declared to be a question of fact proper for the jury. Id. 38; 1 H. Bl. 120. But this matter of fact is not found by the auditor; but only that the promise was within the statute of frauds, which is a conclusion of law merely.

If the plaintiff had paid the defendant a certain consideration for making his promise, there can be no doubt it would have been good; so, too, if he had forborne or given up any advantage, whereby he suffered a loss. *Castles* v. *Aubert*, 2 East. 332; 3 Esp. R. 87; 4 Taunt. 117; Selw. N. P. 831. But the statute of frauds is not to be construed to create, protect and assist fraud; and if it appeared that the defendant had taken an assignment of part ($60) of the fund out of which the plaintiff was to receive his quarterly payments, and notified the plaintiff thereof, and that he must look to him, the defendant, for payment, as it appears by the demand, the plaintiff did, he is not at liberty to avail himself of the statute, and, by this kind of collusion, cheat the plaintiff out of his debt.

——— ———, argued for defendant.

The opinion of the court was delivered by

BENNETT, J. — The case does not find that the contract of the plaintiff with Leland, by which the former had undertaken to carry the mail from Cambridgeport to Londonderry, had been rescinded, or, in any way abandoned by Newell; but the contrary appears. It was still out-standing, and in full force. Upon the non-performance, by Newell, it gave a remedy to Leland for damages. When performed by Newell, it, at all times, furnished him the means of a remedy against Leland for his pay.

The undertaking, then, of the defendant, to see the plaintiff paid, though not in its terms, yet in fact, was *collateral* and *ancilliary* to the undertaking on the part of Leland; and there was no new and independent consideration, moving between the parties to this suit. The rule is well settled, that when the promise is ancilliary to, and in aid of, the promise of another, it is within the statute of frauds. This will always be the case, where there is no new and independent consideration, and there exists another, and a previous liability. This is the doctrine of *Sinclair* v. *Richardson*, 12 Vt. R. 33; and indeed runs through all the cases.

Judgment of the county court is affirmed.

STATE *v.* PEYTON R. CHANDLER, and ROLLIN G. KEYES.

The penalty for "dealing in the selling of foreign or domestic distilled spirituous liquors" may be incurred by a single act of selling without license.

The fact that the liquor is bought for medicine, does not exempt from the penalty.

The keeping and selling, by a retailer, of some of the articles used by apothecaries, does not constitute him an apothecary, but there must be combined therewith, skill in the preparation of medicines.

The supreme court can take no notice of a variance between the proof and an indictment, unless exceptions were taken, on trial, for that cause.

INDICTMENT for selling liquor without license. The indictment charged, that the respondents, on the 12th day of September, 1841, not having a license, &c., "did deal in the 'selling of domestic distilled spirituous liquors, in a less 'quantity, at one time, than twenty gallons, and did, then 'and there, sell, to one John Gray, one pint of alcohol, being 'domestic distilled spirituous liquor," &c.

Plea, not guilty.

On trial, the testimony for the state tended to prove, that the respondents were co-partners in trade, as merchants and apothecaries, and that John Gray, having a sick horse, and wishing to administer to him nitre and alcohol, called on the respondents, and so informed them, and purchased of them a quantity of nitre and a pint of alcohol, which were put into

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the same bottle, by the respondents, and were delivered to, and carried away from the respondents' store by, said Gray. No testimony was produced by the respondents.

The respondents requested the court to charge the jury as follows:—

1. That the defendants must be shown to have sold spirituous liquors more than once, to subject them, as dealers, to the penalty.

2. If the spirituous liquor was bought in such a situation that it was not drinkable, the defendants are not liable to the penalty.

3. If the jury find the liquor was bought as a medicine, and used as such, the defendants are not liable to the penalty.

4. If the jury find that the salt petre was put with the spirits, before it was sold and delivered to the purchaser, and in such a quantity as to render it unfit for drinking, the defendants are not liable to the penalty.

5. That an apothecary has a right, without license, to mix spirituous liquors with his medicine, and sell the same, as well for the cure of sick, or diseased beasts, as human beings.

The court charged the jury that, if they believed the testimony, they should find the defendants guilty, — to which the respondents, after verdict of guilty, excepted.

A. Keyes, for respondents.

I. We complain that the county court refused to charge as requested. In construing statutes, it is a general rule, to look at the evil which the statute is intended to remedy. The evil in contemplation of the framers of the law, on which the indictment, in this case, was founded, is tippling shops and intemperance.

The object of the legislature was to restrain the evil, by confining the sale to a few, whose standing in society would be likely to check, rather than foster, the growth of intemperance. Hence, the selling of medicine compounded of spirituous liquors and other ingredients, which could only be used as an outward application, is not within the evil the statute intended to remedy. The legislature have put this construction upon the statute, by the exception made in favor

of apothecaries using spirituous liquors in compounding medicines, for sick and diseased persons. R. S. p. 401, §28. It is true, that the word *only* is used in the statute after the word *persons*; but it is not used, nor intended, as an absolute negative that the apothecary should compound medicine with alcohol, in any other case, but only that they should not compound alcohol and other ingredients, for any other persons to take, but sick and diseased persons.

If the using of alcohol, compounded with medicines for sick persons, is not within the evil contemplated by the statute, the using of alcohol and nitre, compounded for beasts, is equally not within it. Such use fairly comes within the reason of the exception.

II. We think the charge was wrong in this, that the court charged the jury, if they *believed the testimony*, to bring the defendants in guilty. There was evidently a variance between the allegation and the proof. The allegation is, that the *defendants sold a pint of alcohol, being domestic distilled spirituous liquor.* The testimony was, that the defendant *sold, in combination, a pint of alcohol,* — but there is no evidence that the alcohol was *domestic distilled spirituous liquor.* There are three kinds of alcohol, — domestic distilled, foreign distilled, and alcohol made without distillation, by precipitating the acids from wine or cider, and extracting the aqueous part.

The state should have proved, as they have alleged, that the alcohol sold was domestic distilled. It may have been foreign distilled. It may have been alcohol without distillation.

The article may have been domestic distilled, but, two chances in three, it was not. Roscoe's Cr. Ev. 93; 3 Stark. Ev. 1530.

The omission to prove that the article sold was domestic distilled, was fatal, and the court ought to have so charged the jury; but having charged the jury that the evidence was sufficient, there was error in the charge.

R. Tyler, state's attorney, in regard to the first exception, contended that a single act of selling spirituous liquors was to "deal in the selling" within the meaning of the 23d sec., chap. 83, of the Revised Statutes, on which the indictment

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was founded; because, 1. The first section of the act forbids each and every act of selling, in broad and unqualified terms, and the legislature must have intended to impose the penalty upon the act thus expressly prohibited; 2. Because the 23d section imposes the penalty for "each offence," which, unless it means each act of selling, can have no definite meaning; and 3. Because the 26th section provides that several distinct offences of the same kind may be joined in one indictment, which evidently contemplates that a single act may constitute the offence of "dealing in the sale."

He further contended, in reference to the 2nd and 4th exceptions, that the law contains no provision relative to the *condition* or *intended use* of the liquor, excepting only, that it must not be drunk on the premises of the vendor, and that apothecaries may use it in the compounding of medicines.

In reference to the 3d and 5th exceptions, he maintained that the 28th section of the statute restricted the liberty of apothecaries to the compounding and sale for the use of human beings, as the word "only," in that section, evidently qualifies "persons"—not "sick or diseased," because, *without* it, no one would ever think of selling *medicines* to be administered to any other than the "sick or diseased," and therefore, it would be practically absurd unless used to restrict the sale of the compound to the use of human beings in distinction from brutes.

The opinion of the court was delivered by

HEBARD, J. — The question, in this case, is, had the respondents a right to the charge requested? The court, instead of charging as requested, told the jury that "if they 'believed the testimony, they should find the respondents 'guilty."

This charge has, at least, the merit of being short, and so plainly stated that the jury could not misunderstand it; and, if correct, its brevity is a defect that may easily be excused. The obvious exposition of the charge is, that the jury were told that, although all the points raised by the respondent's request were found to be proved, it would avail them nothing, the law being otherwise,—provided the main facts were proved by testimony which they believed. And it was as well, for the purpose of guiding the jury, as if the court had

enumerated the several points, and given the law, in detail, as applicable to each.

The first point made by the respondents in their request to the court is, perhaps, the one of the most importance, and the one that has been mainly relied upon in argument. But we are not disposed to put that construction upon the statute which they have contended for.

Section first of chapter 83 of the Revised Statutes makes it unlawful for any person "to sell any *spirituous liquors*" in a less quantity than 20 gallons, without a license. The 14th section of the same chapter provides, that "any person who 'shall *deal in the selling* of foreign or domestic distilled spirit-'uous liquors, in a less quantity than 20 gallons at one time, 'shall be deemed to be a retailer within the meaning of this 'chapter." The chapter is entitled "of licenses to retailers, 'inn-keepers, and victualling-houses." The first section of the chapter defines the act that is unlawful, if done without a license,—and that is, "to sell any foreign or domestic dis-'tilled spirituous liquors." This being the act that is forbidden to be done, of course for the doing of this the penalty is incurred. It is not any succession of acts, of a similar character, that constitutes the offence. The 14th section defines who are retailers; and by "dealing in the selling," the same is meant as in the first section, by the expression "*to sell.*"

But there is another view of the case, still more decisive. The 26th section of the same chapter provides, that "if any 'person shall be guilty of more than one *distinct offence* 'prohibited in either of the three preceding sections, he may 'be prosecuted and subjected to the penalties for all such '*distinct offences*, at the same time." There would be a difficulty in understanding when a *distinct offence* had been committed, or how many had been committed, if it required any *number*, or succession of acts of selling, to constitute a *distinct offence.* The result, therefore, must be, that the offence is manifest by the proof of a single act of selling.

The next three points in the respondent's request to the court to charge the jury, relate, substantially, to the same thing, and may all be disposed of together.

The purpose for which the liquor is bought, or what may be the intention of the buyer, is not taken into the account by the statute in defining the offence; nor are we to suppose

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that the legislature intended to discriminate in relation to the ultimate destination of the article. The offence does not consist in buying, but in selling; of course, the *motive* and *intention* of the *buyer*, when regulating the policy of the law, as to the *seller*, was not regarded. The same remarks may apply to the condition of the liquor when bought. If it makes no difference for what purpose it was bought, it can make no difference whether the liquor was in a condition that it could have been drunk.

The remaining point for consideration is the exception in the statute in relation to apothecaries. It is not necessary here to determine what should have been the ruling of the court upon this point, provided the respondents had shown themselves to be *apothecaries*. It is enough for this purpose to say that the case does not show the respondents to have been apothecaries, in the sense in which the term is used in the statute. The mere keeping, and retailing, some of the articles which an apothecary may sometimes have occasion to use, does not, necessarily, constitute an apothecary within the meaning of the statute. It is, then, obviously used in a *professional sense*, combining, with the other parts of his business and occupation, that of *skill* and *judgment* in the preparation of his medicines. It is apparent, from the whole case, that the respondents were apothecaries in no sense, only that they, as is usual for most merchants, kept some of the articles which helped make up the list of medicinal commodities. But the exception in the statute is confined to the "preparation of medicines, to be administered to sick or diseased persons only."

There is a point made here by the counsel for the respondents, which is not presented by the bill of exceptions, in relation to a supposed variance between the proof and the indictment. How far there was a *variance*, or whether, in fact, there was any, does not appear. No exception was taken on that ground; nor was the attention of the court called to that subject. And we, now, sitting as a court of errors, can only look into so much of the case as is presented to us by the record. The only charge of the court which has been shown to us, was in relation to those particular requests of the respondents. The record purports to recite so much of the testimony as related to those points; and we

are bound to presume that, if there had been any defect in the proof, the attention of the court would have been called to it. But as the case does not pretend to detail *all* the testimony, we could not, with propriety, make the desired examination, to see whether the proof met, and sustained, the allegations in the indictment.

Judgment that the exceptions be overruled, and that judgment be rendered upon the verdict for the penalty of the statute.

JOSHUA ROGERS and JESSE ROGERS *v.* HORATIO N. MILLER and ORRIN KATHAN.

R. and R. made a contract with M. and K. to deliver them palm-leaf to be manufactured into hats of a particular description, which they were to receive at a certain sum per dozen. *Held*, that it was proper for R. and R. to charge on book, the palm-leaf when delivered, together with cash advanced; and that, on the neglect or refusal of M. & K. to perform the contract, a recovery might be had against them, for the palm-leaf and cash, in an action on book. *Held*, also, that R. & R. were not obliged to receive a less number of hats than were stipulated in the contract, nor to select out of a large number, sufficient, at the stipulated price, to pay for the cash and palm-leaf delivered.

THIS was an action of book account, in which there was a judgment to account, and reference to an auditor.

The auditor reported that, having notified the parties who appeared before him,—

He "proceeded to the examination of the accounts of the 'plaintiffs. From an examination of the parties under oath 'and other witnesses, it appeared, that, on or about the 2nd 'day of July, 1840, the plaintiffs entered into a contract 'with the defendants to deliver them such quantities of palm-'leaf as the defendants should find it convenient for them to 'procure to be manufactured into hats, and the plaintiffs 'were to receive of defendants the hats that should be by 'them thus manufactured, at eight shillings per dozen. The 'hats were to be from four and a half to five inches in height 'of crown, and the top of the crown 6½ inches in diameter; 'the rims 4 inches wide. It appeared that the palm-leaf 'charged in the plaintiffs' account, had been delivered, and

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'that the money charged had been paid, and that the hats 'credited in the plaintiffs' annexed bill, had been received of 'the defendants by the plaintiffs, at the times they purport to 'have been delivered. And no other claim was set up by 'the defendants of any payments, until about the 25th of 'January 1842, when one of the plaintiffs, to wit, Jesse 'Rogers, called on the defendants, at their store in Dummers-'ton, for the hats they should then have manufactured,— 'whereupon the defendants commenced passing over such 'hats as they then had on hand, to the said Jesse Rogers for 'his inspection, and the said Rogers, after a slight examina-'tion, refused to receive said hats upon the contract afore-'said, alleging that they were not manufactured according to 'the terms of the contract, and then called on the defend-'ants for a settlement of his said account against them, for 'said palm-leaf and money, which the defendants refused to 'pay or settle, and also first refused, but afterwards consented, 'that said Rogers might select from the lot of hats on hand, 'amounting to from three to four hundred dozen, enough to 'pay the balance due on his bill aforesaid; but said Rogers 'refused to receive them.

"There was some discrepancy in the proof in relation to 'the quality of said hats; but the auditor comes to the con-'clusion that the whole amount of hats the defendants had 'on hand, were not such as to answer the contract aforesaid, 'but that a selection could have been made of hats which 'would have been according to the terms of the contract, 'enough to pay the plaintiffs the balance of their account.

"Now, if, from the foregoing facts, the plaintiffs ought to 'recover of the defendants, the auditor awards for the plain-'tiffs the balance of their account and interest from January '25, 1842, amounting to $129.88; but, if the above facts 'do not, by law, entitle the plaintiffs to recover, the said 'auditor awards to the defendants the costs of this audit."

Upon the coming in of this report, the court accepted the same, and rendered judgment for the plaintiffs to recover the balance found by the auditor; to which the defendants excepted.

W. C. Bradley, for defendants.

The defendants contend that sufficient to warrant a judg-

ment for the plaintiffs does not appear from the report of the auditor.

If the leaf and money were advanced on a contract, whereby the plaintiffs were to furnish the leaf, and the defendants to work it into hats of a certain description, at a certain price, which the plaintiffs were to receive, until the amount of leaf and money was reimbursed, the auditor's report ought so to have stated intelligibly, for it is evident from the report, that there was some connection between the delivery of the leaf and money and the delivery of the hats which were called for. If there is any material obscurity on this point the report is defective.

If, in point of fact, it was as above supposed, it was not only a special contract, but one which sounded in damages for nonperformance, and which ought not to be settled in book account.

If it be said that the contract was at an end, it does not so appear, for there was no specific demand and refusal, which amounted to its termination, unless the refusal of the plaintiffs not merely to select, but to receive a *sufficient* quantity of hats, discharged the defendants from a formal tender, in which case judgment ought to have been for the defendants.

Keyes & Bradley, for plaintiffs, contended that the palm-leaf passed into the hands of the defendants, upon a sale, and not a bailment, as, in the latter case, the eight shillings would have been stipulated to have been paid, not, as the auditor found the contract to have been, for "*the hats*," but for *the making of them*; —

That the defendants could not set up in defence to this action, a contract which they had broken, in that but one third of the hats, manufactured from the palm-leaf, were of the description contracted to be made from it; —

That the contract did not compel the plaintiffs to receive the one third; but if it did, that they had not been tendered, as the consent of the defendants that the plaintiffs "might select from three or four hundred dozen, enough to pay the balance," was no tender — it not being in the power of defendants to compel the plaintiffs to select from so great a number. Chip. on Con. 108–9.

The plaintiffs further maintained that they were at liberty

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to seek a remedy, either in damages for a breach of the contract, or by an action of assumpsit or book account, for the cash and palm-leaf delivered; and cited *Wilkins* v. *Stevens*, 8 Vt. 214; *Newton* v. *Higgins*, 2 Vt. 366; *Fry* v. *Slyfield*, 3 Vt. 246; *Way* v. *Wakefield*, 7 Vt. 223; *Hall & Chase* v. *Peak & Co.*, 10 Vt. 274; *Slasson* v. *Davis*, 1 Aik. 73; *Whitney* v. *Corwin*, 5 Vt. 451.

The opinion of the court was delivered by

Williams, Ch. J. — It appears that the plaintiffs and defendants entered into a contract, by which the plaintiffs agreed to furnish the defendants such quantity of palm-leaf, as they could conveniently manufacture into hats, and the plaintiffs were to receive of them all the hats, thus manufactured, at eight shillings per dozen.

Whenever the palm-leaf was delivered, it was proper for the plaintiffs to charge the same to the defendants, on book, and, also, whatever sums in money they might advance, on the same contract, although payment was not to be made therefor, until the hats were manufactured and ready for delivery. This is in accordance with the decision in the case of *Strong* v. *McConnell*, 10 Vt. 231. The charges were, therefore, properly made on book, although no action could have been maintained to recover the same, until the defendants had, by some act of theirs, refused to fulfill the contract on their part.

It appears from the report, that the defendants did not manufacture the palm-leaf into such hats as the contract required. The plaintiffs were under no obligation to receive a less quantity than was stipulated for, in the contract; and were not obliged to select out of a larger number, sufficient, at the stipulated prices, to pay for the cash and palm leaf delivered. On this neglect of the defendants to fulfill the contract, the plaintiffs could either have maintained an action of assumpsit, to recover damages for the breach of the same, or they could have maintained an action of assumpsit, or an action on book, to recover the value of the palm-leaf and cash delivered to the defendants. We can see no reasonable objections against the recovery by the plaintiffs for the balance reported by the auditor.

The judgment of the county court is, therefore, affirmed.

Esther Spears v. David H. Forrest.

Where the overseers of a town had assumed the control of a prosecution for bastardy, it was held they were competent witnesses—the objection arising from their corporate interest being removed by statute.

Evidence of common prostitution is not admissible to impeach a witness.

A complaint for bastardy need not have a minute, by the magistrate, of "the true day, month and year" it was exhibited to him.

This was a complaint for bastardy, carried on against the defendant by the overseers of the poor of the town of Guilford, under the statute—the said overseers having undertaken to control and manage said suit, and signed a certificate agreeably to the 13th section of the statute, to indemnify the complainant from the cost of said suit, and the support of the bastard child.

On the trial, one of the overseers was offered as a witness for the prosecution, was objected to by the respondent, and was admitted by the court. The respondent offered to prove that the said Esther, the mother of the child, (improved as a witness for the complaint,) was an inmate of a house of ill-fame, and was herself notorious as a prostitute, at the time of the begetting of the child and ever since; which evidence was rejected by the court.

The defendant, also, moved the court to dismiss the said action, and that the same be no further prosecuted—the magistrate, to whom the same was exhibited, not having made, at the time of the exhibiting of the same, a minute thereon, in writing, under his official signature, of the true day, month and year when the same was exhibited,—and when he signed the process which was issued on said complaint, not having entered on said process a true minute of the day, month and year when the same was signed; which motion was overruled by the court.

To all which decisions, after the order of filiation was made, the defendant excepted.

———— for defendant.

In regard to the notorious prostitution of the witness, we contend, that the welfare of society, as well as the safety of all parties in court, requires a revision, and reversal, of the previous decisions on this subject.

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Moore v. *Pinneo*, 4 Vt. R. 281, was an instance, not of present prostitution, but of former reputation. In *Com.* v. *Moore*, 3 Pick. 194 — an offer to prove the witness' character for chastity bad—the court refused this "still greater relaxation of the rule." In *State* v. *Smith*, 7 Vt. R. 142, the court admit that this, like most of the vices, impairs the moral sense, and weakens the sense of obligation to speak truth; but compare it to thieving and intemperance. The notorious thief cannot long pervert justice by his testimony. He may be indicted, and the public protected. But mere prostitution, if it be not "open and gross lewdness and lascivious behaviour," is not indictable. Nor is it indictable to be an inmate of a house of ill-fame. Rev. S. 444. And even the keeper of a brothel would, if convicted, be a competent witness.

But it is suggested that notorious prostitution will have its due effect on the testimony of the impeaching witnesses. This reasoning, if applied to *thieving*, might be true, for every theft includes a lie. But in relation to prostitution, the witnesses will answer, as the overseer did, at the county court, that he "never heard her truth and veracity called in question;" and here the inquiry must end.

We object to a rule of evidence that offers a bonus to prostitutes, and protects them, when testifying, from the investigation to which others are subject. The notorious and professional prostitution of the female, for money, effectually prevents any discussion of the truth and veracity of such a person. The virtuous part of society, fit to be impeaching witnesses, shun her; and the *others* only know her in her all-absorbing professional reputation. Yet, by this rule, the *reason* why her truth and veracity are not called in question must be kept a secret from the jury. With regard to other persons, a prurient imagination—a spirit of romantic exaggeration, a humorous levity, may all be suddenly visited upon an honest man, or virtuous woman, and fix upon them different shades of discredit.

We do not contend that all the different shades of bad character for chastity, are to be shown as impeaching evidence; but simply for the rule that prevails in Massachusetts, namely, the right to prove notorious professional prostitution. *Com.* v. *Murphy*, 14 Mass. 387.

A. Keyes, for plaintiff, contended, that the overseer was properly admitted as a witness, as the filing of the certificate by him was an official act, in behalf of the town, not rendering him personally liable, but leaving him upon the footing of other inhabitants of the town, made competent witnesses by statute.

He also contended that the proffered evidence of notorious prostitution was properly rejected, as impeaching testimony, and cited 1 Stark. Ev. 146; *Jackson* v. *Lewis*, 13 Johns. R. 504; *State* v. *Moore*, 13 Pick. 194; *Moore* v. *Pineo*, 4 Vt. R. 281; *State* v. *Smith*, 7 Vt. R. 142.

The opinion of the court was delivered by

BENNETT, J. — We think no objection can be raised as to the competency of the overseers of the poor of Guilford as witnesses, which would not apply to other inhabitants of the town. If they have an interest, it is but a corporate one; and such an objection is removed by statute.

The evidence of common prostitution is not admissible to impeach the character of Esther Spears, as a witness. After two direct decisions upon this very point in our own courts, founded, as I think they are, upon authority, the question cannot be considered, with us, as an open one, whatever the decisions may have been in some of our sister states. See Greenl. Ev. 512, 513, and n. 3.

This prosecution, it is well settled, is but a civil action, the object of which is to obtain an order of filiation. It is not a case in which the statute has required a minute of the true day, month and year when the complaint was exhibited.

The result is, there is no error in the proceedings of the county court.

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OTIS BARDWELL and GEORGE HUNTINGTON *v.* Town of JAMAICA.

An abutment to a bridge, as matter of description, is part of the bridge; and when a declaration alleged an injury to have been occasioned by the insufficiency of a bridge, and the proof was, that the defect and insufficiency was in the abutment — *Held* that this was not such a variance as to be ground for reversing the judgment.

When damages are claimed of a town, for injuries sustained by reason of the insufficiency and want of repair of a road or bridge, the right to recover will not depend upon the town's having notice of such defect.

When the *primary* cause of the damage was occasioned by the fault of the town, the person injured will be entitled to the whole amount of the damage, unless it has been increased by his own subsequent negligence or misconduct.

THIS was an action of trespass on the case, in which the plaintiffs declared, that a certain bridge, on a public highway in the town of Jamaica, was, on a certain day, "insufficient 'and out of repair, in this, that the flooring or covering of 'said bridge was decayed and ruinous, and that the poles, 'logs, slabs, or planks, forming the same, were rotten and 'decayed, and in that said bridge was not suitably and prop-'erly supported by string pieces, but that the same had be-'come rotten and decayed, and in that the abutments of said 'bridge were loose, weak, not properly supported, worn, in-'jured, decayed and in a ruinous condition;" and that, in passing, on said day, with their stage-coach and horses, "on 'and across said bridge, on said highway, by reason of the 'insufficiency and want of repair of said bridge, the said 'bridge gave way, fell down, and broke through, under the 'feet of one of the horses aforesaid, a chesnut mare, of the 'value of one hundred dollars, by which, &c." Here followed a dscription of the injury, and an allegation that the mare died thereof.

Plea, not guilty, and trial by jury.

On the trial in the county court, the plaintiffs gave evidence, tending to show that, at a certain spot, mentioned in the declaration, there was a bridge over a sluice-way, made by laying down two logs with pieces of timber across said logs, and planks over them, for a covering, and the whole covered with dirt so as to give the appearance of a solid road; that while properly drawing the stage over this

place, a mare of the plaintiffs, in the team, broke a hole through the plank of said bridge, and occasioned the injury complained of.

The defendant introduced testimony tending to show, that the hole above mentioned was not within, but was without, the limits of said bridge, including said logs, and was in the solid road, by the side of the bridge, and adjoining the logs laid for the abutments of the bridge, by the side thereof.

The plaintiffs, also, gave evidence tending to show, that the mare, when she came to Townshend that evening, which was on Friday evening, the first of October, 1841, was ailing, and so continued until Monday following, when she appeared better; that the plaintiffs then drove her in the stage from said Townshend to Brattleboro, a distance of seventeen miles, in three hours, in a rainy day, and returned with her in the stage to Townshend, the day following; that she showed symptoms of illness on the day to and from Brattleboro, and on the Monday following; that they doctored the mare in the most prudent and best way — that she did not eat, and that it was thought prudent to exercise her to restore her appetite.

The defendant requested the court to charge the jury that, if the place where the accident happened, was without the limits of the bridge, although in the road by the side of it, the plaintiffs were not entitled to recover; or if the place where the hole was broken through, was in the solid part of the highway, which had been well made, where it could not have been known to any, or anticipated as likely to have happened, although it was by the side of the bridge, that the town was entitled to a reasonable time to repair the same, before they could be made liable; and, furthermore, that the plaintiffs, knowing their said beast to be ill, were bound to use proper care in the treatment of her, and that, if her death was occasioned by her being driven to Brattleboro in the manner she was, that the plaintiffs could not recover for the loss.

But the court did not so charge the jury, but did, on the contrary, charge them, that the plaintiffs must prove, in order to recover, that the injury happened to the mare in consequence of the insufficiency of the bridge, or the abutments of the bridge; but if the jury believed that the hole in the road was in the abutment, or on the outside of, and adjoining,

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the logs on which the planks were laid, and was occasioned by the rottenness or decay of the timbers or plank, it would be an insufficiency, or want of repair, within the terms of the declaration of the plaintiffs; —

That the town was made liable, by the statute, for the insufficiency or want of repair of their roads and bridges, and that, if the said insufficency happened in consequence of the decay of the timbers or plank, and the plaintiffs had sustained an injury thereby, the town was liable, notwithstanding they had no notice of the same, or had not had time to repair the bridge after the insufficiency was discovered; —

That the plaintiffs, if they were entitled to recover on the evidence exhibited, should recover all the damages which they had sustained, as a direct and necessary consequence of the injury complained of, and no more; that they were bound, after they discovered the mare was ill, to use proper care in the treatment of her; and if the jury believed that they doctored her in the way considered prudent and best by those who saw her and were acquainted with the manner of doctoring and healing horses injured, and put her into the team and drove her to Brattleboro for the purpose of exercise, believing, at the time, that exercise was necessary for her recovery, and to restore her appetite, and did not drive her immoderately or imprudently, the plaintiffs might recover for the value of the mare, although it might afterwards appear that such driving was injurious, and occasioned her death — if the primary cause of her sickness and death was the injury she received on the road.

To these parts of the charge, the defendant, after a verdict for the plaintiffs, excepted.

W. C. Bradley, for defendant.

1. It might be unnecessary for the plaintiffs to describe the *precise* local situation out of repair, and where the injury happened by reason thereof; but if they choose to do so, they must prove it as laid, and a variance is fatal. 2 East, 200; 4 Starkie Ev. 1574; 2 Cowen's Phill. 536, 506. Here it was necessary for the plaintiffs to allege some place out of repair, and also where the injury happened, that the charge might be definite, and the defendant prepared for de-

fence. Now, *the bridge* is the place and the *only place* alleged to have been out of repair, and that the injury happened while the plaintiffs were passing the bridge and by reason of the insufficiency of the bridge. It is contended that a failure in proving either of these facts entitles the defendant to a verdict; and that proof of an injury happening elsewhere, no matter at how small a distance, is a variance, and will not support the declaration upon which a general verdict has been given.

2. If there was no appearance of defect, or from which it might have been inferred, as the plaintiffs have alleged a scienter, they ought to have been holden to prove it.

3. The charge was incorrect, in first directing the jury that the rule of damages was what the plaintiffs had sustained "as a direct and necessary consequence of the injury complained of, and no more," and then charging them, that, if the death of the mare was occasioned by the injurious driving her, when she was already sick from the previous cause, on another, and a rainy day, in the plaintiffs' stage to Brattleboro, the plaintiffs might recover her value, if they did not drive her immoderately and imprudently, and believed that exercise was necessary for her recovery, and to restore her appetite—if the primary cause of her sickness and death was the injury on the road. This is believed, besides, to be altogether too indefinite and perplexing to the jury.

D. Kellogg, for plaintiffs.

The first alleged error in the declaration, and in the charge of the county court is that the abutments were considered a part of the bridge, for the purposes of this action. In this there was no error. The terms "highway" and "bridge" include *all* that constitutes a public thoroughfare, and exclude each other. These are the only terms used in the Rev. Stat. (except the word causeway is used, ch. 21, § 38,) and they invariably exclude each other. *Osmond* v. *Widdicombe*, 2 Barn. & Ald. 49; 1 Black. Com. 357. And such is the ordinary construction. See Webster's Dictionary—bridge, pier, trestle, abutment; Rev. Stat. ch. 20, § 20–40; ch. 21, § 26. Is not the abutment within the *reason* of the statute referred to? *Brookline* v. *Westminster*, 4 Vt. 224.

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In England, the parish is bound, of "common right," (1 Black. Com. 357) to construct and repair the "highway," while the county or other municipality or person may be bound to repair a "bridge" connected with the "highway." The statute, 22 Hen. VIII, ch. 5, ascertaining and fixing the limits of "bridges" at 300 feet from each end of the suspended structure, was only declaratory of the common law. 4 Petersd. Ab. 497; *Rex* v. *W. R. York*, 7 East. 588; 22 Eng. C. L. R. 189; *Noyes* v. *Morristown*, 1 Vt. 353; 35 Eng. C. L. R. 329.

The opinion of the court was delivered by

HEBARD J.—The defendant requested the court to charge the jury "that if the place where the accident happened was without the limits of the bridge, although in the road by the side of it, the plaintiffs were not entitled to recover." It is usual for the court to instruct the jury upon every point requested, when there is evidence tending to establish the position contended for. But this case discloses no testimony tending to establish any such fact. The case finds that the testimony tended to prove that the plaintiffs' mare broke through the bridge, and no other testimony upon that point is alluded to in the case. This proof, then, corresponds with the declaration substantially.

But, upon another point, the court gave instructions to the jury, of which the defendant complains. The court charged the jury that, in order to recover, the plaintiffs must prove that the injury happened to the mare in consequence of the insufficiency of the bridge, or the abutments of the bridge.

We think that charge correct. The abutment, in the sense in which the term is, ordinarily, used, is a part of the bridge. The abutment has such an immediate connexion with the other parts of the bridge, that, in speaking of a bridge, in connexion with the use for which bridges are erected, we can no more exclude the abutment from our minds than the flooring, or the frame-work, of the bridge.

The defendant further excepts to the charge of the court in relation to notice of the insufficiency of the bridge, to which the town was entitled. The statute makes towns liable for all damage that happens by reason of the insufficiency of any road; and no exception or provision is con-

tained, in the statute, requiring notice to be brought home to the town. If notice is required, of the insufficiency of a road, before the town is liable, there must be some provision in the statute defining what shall be deemed notice, and to whom, and in what manner, notice shall be given, to be legal. Without such provision it would be difficult to give any notice that the law would regard.

The defendant also complains of the charge in reference to the damages. The jury must have found that the injury was sustained by the fault of the town, without any fault on the part of the plaintiffs, or they would not be entitled to recover any damage; and the charge of the court puts it upon this ground. The primary cause of the death of the plaintiffs' mare being the fault of the town, the plaintiffs are entitled to recover the whole amount of the damage, unless it has been increased by their subsequent negligence or misconduct; — and this was left for the jury to find.

Judgment affirmed.

ABIEL STODDARD *v.* ZIBA CHAPIN.

It is the duty of an auditor to report facts, and all inferences of fact; and the court, in deciding on his report, are to determine only questions of law.

An auditor may not report the evidence merely, and leave it for the court to investigate the same, and come to conclusions as to what is proved.

A charge of money overpaid on a note, by mistake, cannot, without giving previous notice of the overpayment, be recovered in an action on book, when the mistake was not the defendant's, and he did not, in any way, induce it.

THIS was an action of book account, appealed from a justice of the peace, in which there was a judgment to account, in the county court, and a reference to an auditor.

The auditor reported that the parties having appeared before him, —

"The plaintiff exhibited his account against the defendant, of which the following is a copy:

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1837. Ziba Chapin to Abiel Stoddard, Dr.

To 1 days' work, by Rufus Cobb,	84	
May or June, cash delivered wife,	5.00	
Oct., 1838, overpaid on note,	50	
		$ 6.34
Cr. By cash to balance days' work,		84
		$ 5.50

"On the hearing of the case, the auditor reports, that the following facts appeared in evidence:—That the wives of the parties are sisters; that, at the time of the intermarriage of the defendant with his wife, in 1835, she held two notes against the plaintiff, amounting to about $50.00; that, in January, 1837, the plaintiff, in a settlement with the defendant of said notes, took up said notes and gave a note for the balance of said notes, made payable to the defendant, for the sum of $19.00, and that the defendant, at the same time, delivered said $19.00 note to his wife; that, during the summer season of 1837, the defendant was out of health—that his wife went to mill, went to procure help in haying and reaping, to purchase rye twice, to see about getting help to clear off a piece of land and to chop; that, in May or June, 1837, the defendant's wife called on the plaintiff for $5.00, which sum the plaintiff delivered to her, and that nothing was said, at the time of the delivery of said $5.00, in what way the same was to be accounted for; that, soon after the defendant's wife received said $5.00 of plaintiff, defendant's wife told defendant that there was a report that Bellows Falls Bank had failed, and that she had examined her money to see if a $5.00 bill, which she said she had received of plaintiff, was not on said Bank, and found that it was not; that he then requested her to examine his pocket book to see if he had any bills on said Bank; but it did not appear that defendant ever had actual possession of said $5.00, or that he, in any way, had the use of it; that, in October or November, 1837, the defendant's wife requested the plaintiff to get her a shawl, and that plaintiff procured one for her which cost about $10.00; that, in October, 1838, the plainsiff went to defendant to take up said $19.00 note, at which time the sum for the shawl had been endorsed upon said note; and that the plaintiff then requested, that the

said sum of $5.00 be applied upon said note in part payment thereof, but the defendant declined to apply said sum on said note; and that the same was not allowed towards the payment of said note, or in any way accounted for by the defendant to the plaintiff; that the plaintiff, at that time, took up said $19.00 note, and charged the said sum of $5.00 to defendant; and that, upon the payment of said $19.00 note, the plaintiff, through mistake, paid the defendant fifty cents more than there was then due on the same, and did not discover the mistake previous to the trial of this cause before the justice, at which time he made charge thereof to the defendant. It also appeared in evidence that defendant's wife, after their marriage, had, from time to time, received money of plaintiff upon said two first mentioned notes, and that defendant's wife had let defendant have $25.00 of the money she had received of plaintiff as aforesaid, and that he procured a stove with said money.

Defendant offered his wife as witness in said trial before the auditor — who was, by the auditor, rejected.

If, upon the foregoing statement of facts, the court are of opinion that the item of fifty cents is a proper book charge, and that said item of $5.00 is not, then, in that case, the auditor finds and awards, that the plaintiff recover of the defendant the sum of sixty cents, including interest, to balance book accounts between them, and his cost at this and a former hearing before the auditor, taxed and allowed at $30.35, exclusive of auditor's fee of last hearing — $6.00. If, upon the facts aforesaid, the court are of opinion that the charge of $5.00 is a proper book charge, and that the item of fifty cents is not, the auditor finds and awards that there is due from the defendant to the plaintiff, to balance book accounts between them, the sum of $6.25, and his costs as aforesaid; And if the court, upon the facts as aforesaid, are of opinion that both items, to wit, the item of $5.00 and the item of fifty cents, are proper items of book charge, then, in that case, the auditor finds and awards that the plaintiff recover of the defendant the sum of $6.85 (including interest thereon) and his costs, taxed, as aforesaid, at $30.35, and auditor's fee $6.00. But if the court, from the aforesaid statement of facts, are of opinion that neither of said items, to wit, the item of $5.00 or the item of fifty cents, are items

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of proper book charge, then, in that case, the auditor finds that there is nothing due from the defendant to the plaintiff, on book, to balance book accounts between them, and finds for the defendant his costs, taxed at $19.25, including auditor's fee of $6.00."

Upon the coming in of the report, the court accepted the same, and rendered judgment for the plaintiff, for $6.85, and his costs. The defendant excepted.

D. Kellogg, for defendant, insisted that the plaintiff was not entitled to recover the item of $5; and cited *Bradley* v. *Goodyear*, 1 Day's Cases, 104; *Chellis* v. *Wood*, 11 Vt. R. 466; *Montague* v. *Benedict*, 1 Carrington, 356; *Earl* v. *Peale*, 1 Salk. 387;—

And that the fifty cents in the plaintiff's account, under the circumstances stated in the auditor's report, was not a proper subject of book charge.

J. McM. Shafter, for plaintiff.

I. The plaintiff may maintain an action for the fifty cents overpaid on the note. No notice of the overpayment was necessary, for the defendant had the same means of knowing it as the plaintiff; and was bound to see to it that he did not receive more than was due to him. No request of payment was necessary, for it was a debt or duty precedent. 1 Saund. 33; Chit. Plead. 322; 1 Sel. N. P. 111; 18 Johns. R. 485. Book account is the proper action. 10 Vt. R. 474.

II. The defendant is properly chargeable with the $5 paid to his wife. She was his general agent, as is evident from the finding by the auditor that she purchased grain, hired help, received money of plaintiff, with the defendant's assent, to purchase a shawl, received of plaintiff, with the like assent, money on her notes, which came to defendant's use, and was, by the defendant, constituted his agent to receive money on the $19 note. The sufferance of these acts by the defendant precludes him from disputing the agency of the wife. Paley Ag. 138–9, 196, 230; Story Agen. 58, 60, 93, 118; *Ordiene* v. *Maxcy*, 13 Mass. 178.

Though the auditor has reported that it did not appear that the $5 bill ever came to the corporal touch of the defendant, yet, in law, it must be considered as having come

to his possession and use. The possession of the wife was the possession of the husband. 2 Black. 435; 9 Vt. R. 320.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The only subject of dispute in this action is, whether the county court was correct in rendering judgment for the plaintiff to recover the two charges, one of five dollars as cash delivered the wife of the defendant, and the other of fifty cents for money overpaid on note. If the county court were incorrect in allowing these charges, judgment should have been for the defendant, and this would have carried the cost, which has increased to a large amount.

On reports of auditors, the county court are only to decide questions of law arising from the report; and it is only their decision on these questions which this court ever reviews or revises. It is the duty of auditors to decide upon all questions of fact arising in the investigation of an account, and to deduce all inferences of fact which may be legitimately drawn from the evidence. They may not report the evidence, merely, and call upon the court to investigate the same, and come to a conclusion as to what facts are proved.

In relation to the charge of five dollars, the auditor has not found and reported that the defendant was indebted, nor has he stated any facts from which the law would raise any such indebtedness. He reports that the wife of the defendant had of the plaintiff five dollars; but omits to say on what account. He does not report that it was received to be repaid, or that it was received as payment, or part payment, of the note which defendant's wife held against plaintiff, and which defendant afterwards refused to have applied. He says the same never came to the custody of the defendant, or that it, in any way, ever came to his use.

As to the agency of the wife, it is sufficiently stated that she acted as agent at times;—and there are several acts of agency stated, from which the auditor might have found that she received this money for, and on account of, the plaintiff. But he has not so reported; and, from what is stated, it is uncertain whether the money was given as a gratuity, or whether it was a loan, or whether it was in payment of the

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note. The county court, on that report, as on a special verdict, were not authorized to decide that the defendant was legally accountable to the plaintiff for that sum, and that the plaintiff should recover therefor.

With respect to the charge of fifty cents, the facts found by the auditor are very few. The plaintiff, through mistake, overpaid that sum on the note which he gave the defendant, and this mistake was not discovered by either, until after the commencement of this suit, nor previous to the trial before the justice of the peace. It is not found that it was through the mistake of the defendant, or under any uncertainty of the facts, or by miscast, induced in any way by the defendant. The plaintiff had the knowledge of, or the means of knowing, the exact amount due on the note; and if he overpaid it through his own mistake, it cannot be said that he could, immediately, and without giving any previous notice to the defendant, have commenced an action therefor. It partakes so much of the character of a voluntary payment, that we think the plaintiff could not maintain any action therefor, until he had pointed out to the defendant the mistake, and given him notice that he should call on him for the payment of the same. With respect to this charge, as well as the other, sufficient is not reported to show the defendant indebted to the plaintiff. The judgment of the county court is, therefore, reversed, and judgment is to be rendered for the defendant to recover his cost.

MOSES GOODELL v. TIMOTHY FIELD.

(In Chancery.)

A court of chancery will correct a written instrument where, through fraud, or mistake, it was written different from the intention of the parties.

Parol proof is admissible to prove such mistake; but it must be clear and strong to induce a court of chancery to interfere.

When a party has not fulfilled an agreement of sale by performance on his part, and offers no excuse for his neglect, a court of chancery will not compel the other party to perform his part of the agreement.

THIS was an appeal from a decree of the court of chancery dismissing the orator's bill.

The orator, in his bill, set forth and charged, in substance, that, on the 1st of January, 1836, one Lewis Robbins, a son-in-law of the orator, being the owner of a certain piece of land in Westminster, on which the orator resided, of the value of $1000, and desirous to assist the orator to have a home, and being, moreover, under a necessity to dispose of said premises, proposed to sell the same to the orator for $600, and as the orator had not the means of immediate payment, required by Robbins, he proposed to orator that he should apply to some money lender to advance said sum, and give him time to pay the same with interest—taking security on said premises; that the orator applied to the defendant for said loan for six years; that the defendant agreed to advance the said $600; and thereupon it was agreed between them that the defendant should take a conveyance of the premises from Robbins, and give the orator a lease of the same for six years, at the annual interest, or rent, of $36, with a covenant that if the orator should, at the end of said term—the interest, by way of rent, being, in the mean time, paid—pay said $600, the defendant would convey the premises to him in fee;—that Robbins executed a conveyance of the premises to the defendant, and the defendant received the same, under said understanding; that, soon after, the defendant called on the orator with a lease ready drawn, read a few lines of it, professed to be in haste, but assured him that the lease was drawn according to the agreement; and that the orator, confiding in the defendant, executed said lease, without reading the same; that he subsequently found that it required the payment of $100 of the principal annually, besides the interest, and that he, thereupon, applied to defendant to have the lease corrected; that he paid the annual interest, as stipulated, for the first five years, and, at the end of said six years, tendered to defendant the said $600, with the last year's interest, and requested a conveyance of the premises, which defendant refused to give; and praying that said lease might be corrected, and the defendant decreed to accept said sum so tendered, and convey the premises to the orator.

The defendant, in his answer, denied any knowledge of the proposition alleged by the orator to have been made by Robbins to orator, in regard to the purchase of the premises,

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and an application for a loan to pay for the same; and denied that the orator applied to him to loan any money for that purpose or for any other purpose; and also denied the alleged agreement with orator to give him a lease with a covenant to convey to him the premises upon the payment of the annual rent of $36, and the payment of $600 at the end of six years, and that Robbins executed the conveyance with such an understanding; but alleged that Robbins having purchased the premises subject to a mortgage, and having mortgaged the same to secure the payment of a portion of the purchase money, and being not well able to pay said mortgages, was desirous of disposing of his interest in the premises; that the defendant having learned this, and desiring to purchase the premises, applied to the orator, who occupied the same — the said Robbins residing in Boston — to learn whether Robbins was disposed to sell — which the defendant alleged was his first conversation with orator on the subject.

And the defendant further alleged, that, having reason to suppose that a permission by the purchaser of the premises to the orator to occupy them for a while, paying rent, would be an inducement to Robbins to sell the same, he suggested to the orator that, upon the purchase, he would lease the same to the orator for six years; that orator replied that he had hoped to be able to make the purchase himself, and that Robbins would prefer to sell to such person as would be willing to sell to the orator, if he would pay therefor by yearly instalments of $100, which he stated that he should be able to do; that the defendant, deeming it improbable that the orator would be able thus to pay said instalments, thereupon agreed to purchase the premises—to lease the same to the orator for six years, upon an annual rent of $36, and, on the payment of said rent, and $100 annually for six years, to convey the same to the orator in fee; that he, the defendant, after the purchase from Robbins, drew a lease in accordance with said understanding, and twice read the same in the hearing of the orator, and handed it to him to read; whereupon the orator signed said lease and delivered it to the defendant. The defendant admitted the payment, annually, of the said rent, for five years, and that, at the expira-

tion of said six years, the orator tendered to him the said $600, together with the rent for the sixth year.

The answer was traversed, and testimony taken. Among the witnesses were the said Lewis Robbins and two daughters of the orator, referred to in the opinion of the court. The import of the testimony sufficiently appears in the opinion.

A. Keyes, and *D. Kellogg*, for the orator.

1. If a deed, through fraud or mistake, is not made according to the agreement of parties, it may be corrected in chancery; and parol testimony is admissible to prove such fraud or mistake. 1 Mad. Ch. 49, and cases cited; *Langly* v. *Brown*, 2 Atk. 203; *Gillespie* v. *Moon*, 2 Johns. Ch. R. 585; *Gales* v. *Green*, 4 Paige. R. 355; *Ball* v. *Storie*, 1 S. & S. R. 355; same case, 1 Cond. Ch. R. 106; Am. Ch. Dig. 290.

2. Such parol testimony is admissible where the bill seeks a correction of the instrument, and a specific performance of the contract thus corrected. 1 Story's Equity, 175; *Keiselbroek* v. *Livingston*, 4 Johns. Ch. R. 144; *Gillespie* v. *Moon*, 2 Johns. Ch. R. 585; *Ball* v. *Storie*, 1 S. &. S. 210; 1 Cond. Ch. R. same case, 106.

3. If it was a conditional contract to convey, and the *time* was not material and not of the essence of the contract, there is still an equity. *Campbell* v. *Worthington*, 6 Vt. R. 455 — especially if it is apparent that the transaction assumed this shape to disguise a loan. 2 Story's Equity, 285.

W. C. Bradley, for defendant.

This is not a bill in favor of Robbins to enforce any provision, or trust, in consideration whereof he delivered the deed, nor for any fraud practised on him, in obtaining the deed, nor for anything growing out of the privity between him and the defendant; of course, he, not being a party, his intentions or motives are of no consequence in this suit.

On the other hand, it is evidently to establish and enforce a pretended agreement for the conveyance and sale of land from Field to Goodell, who was a stranger to the title, and from whom no consideration moved. If such an agreement, by parol, had been made, in the fall of 1835, or even so late

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as the time of the execution of the deed from Robbins, it could not have been enforced by Goodell, either as a trust, or otherwise, if it had not been reduced to writing.

But the agreement having, at a subsequent time, been reduced to writing, cannot now be explained away or contradicted by parol testimony, so long as the writing subsists, that instrument being taken, in equity, as well as at law, as the exponent of the final intention of the parties.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The object of the bill, in this case, was to correct a written lease, executed by the defendant, to the complainant, and make it conformable to the agreement of the parties, and for a specific performance of the same, according to such agreement. The material allegations in the bill are denied in the answer. The defendant insists that the lease was made according to the understanding of the parties, and was read to, and understood by, the orator. The lease, which is, also, a contract of sale, was made in January, 1836.

It appertains to the jurisdiction of a court of equity to correct and reform written instruments, when, through mistake or fraud, they are made to convey a meaning which the parties did not intend; and, as a necessary consequence of this jurisdiction, they must receive testimony to show what the parties did intend, and wherein consists the mistake. Parol proof is received for this purpose. As the writing is, usually, the best evidence of the intention of the parties, it is supposed, whatever agreements they may have contemplated or conversed about, they understood what they are about to do, when they entered into a written contract. The evidence, therefore, must be clear and strong, and such as to leave no doubt of the mistake. Lord Thurlow said, in *Ingraham* v. *Childs*, 1 Bro. 94, that it should be proved, as much to the satisfaction of the court as if it were admitted; and in *Shelburn* v. *Inchiquin*, 1 Br. 338, that it must be proved by strong, irrefragible evidence; and in *Gillespie* v. *Moon*, 2 Johns. Ch. 585, where Chancellor Kent reviews all the authorities upon the subject, he says — "the cases concur in the strictness and difficulty of the proof" required.

In the present case, there was only one witness present,

at the time the farm was deeded to the defendant — Mr. Robbins, — and he swears to a different agreement from the one insisted on by the defendant. The testimony of Robbins may be said to be corroborated by that of the daughters of the complainant, who swear to a conversation in the fall of the year 1835; so that if there had been no writing, we might have considered, there was sufficient testimony to establish the agreement as testified to by Mr. Robbins. There is, however, not sufficient evidence to show any mistake or fraud in the execution of the lease. One of the daughters of the complainant, says, the lease was not read as stated by the defendant in his answer. This, at most, is negative testimony; and it is hardly probable the complainant should have executed the lease and not know its contents. The lapse of time since this business was transacted, before any steps were taken by the complainant to correct the terms of the lease, and establish the same according to his statement of the contract, — the testimony being all from the family — one of them being the son-in-law of the complainant, the other two his daughters, one of the age of 15, and the other of the age of 12, only, at the time, — it being mere hearsay, — the improbability that the agreement should have been varied in the manner alleged, as the only difference is whether the sum of 600 dollars should be paid at the end of the six years, or by instalments, and the little inducement and benefit there could have been to the defendant, to alter it, either one way or the other — are strong and powerful arguments against the application of the orator. The testimony is very slight, instead of being clear, strong, and irrefragible, as it should be, to induce a court to alter, reform, or correct a written instrument.

Upon the contract, as it is written, the complainant is not entitled to relief. No attempt has been made on his part, to perform the same, according to the terms, and no excuse is offered for this neglect.

The decree of the chancellor, dismissing the bill, is, therefore, affirmed, with cost.

WINDSOR COUNTY.

FEBRUARY TERM, 1843.

PRESENT HON. STEPHEN ROYCE, ISAAC F. REDFIELD, MILO L. BENNETT, WILLIAM HEBARD, *Assistant Justices.*

JOHN PETTES *v.* DANIEL MARSH.

Trover may be maintained by an officer, against a debtor, for property which had been owned and possessed by the debtor, and receipted by him to the officer, as attached, though it was not actually seized, or even seen, by the officer.

THIS was an action of trover for three hundred and fifty sheep. Plea, not guilty. Issue to the court.

On trial, the plaintiff read in evidence the following receipt and endorsement thereon:

"Hartford, Nov. 14, 1839.

"Received of Moses Montague, deputy sheriff, three hundred and fifty sheep, of the value of six hundred dollars, which we agree to redeliver on demand. Said property said Montague has this day attached on a writ of attachment in favor of the bank of Woodstock v. Daniel Marsh, Leonard Marsh, and Thomas W. Pitkin, demanding in damages eight hundred dollars. Returnable at November term, 1839, of Windsor county court. (signed) DANIEL MARSH.
GEORGE UDALL."

"Hartford, Aug. 13, 1840.

"I acknowledge a legal demand of the within described property by a proper officer.

(signed) DANIEL MARSH."

It appeared that Moses Montague was the deputy of the plaintiff, then sheriff of Windsor county; that said Montague duly returned the writ mentioned in said receipt, with his

return thereon, that the same was served by the attachment of 350 sheep; that such proceedings were thereon had, that said bank recovered a judgment at the May term of Windsor county court, 1840; and, that execution was issued on said judgment, and, within thirty days, was delivered to said Montague, still deputy sheriff, who within the life thereof, on the 13th day of August, 1840, demanded the said sheep of the defendant whereon to levy said execution, but the same were never delivered to, or obtained by, the officer, and the execution remained unsatisfied.

It also appeared that, at the time of the service of said writ, the defendant owned, and then had on his farm, five hundred sheep; that, on the 16th of July, 1840, having become insolvent, he made an assignment of his property to John Strong, for the benefit of certain preferred creditors, and that, among that property he delivered said Strong 199 sheep, being all he had left of the sheep he owned in November, 1839. What had become of the rest of the sheep did not appear. It also appeared that when said Montague came to serve said writ, it was in the evening, and he did not see said sheep or take any possession thereof; and that it was on that occasion, and at that time, that the receipt was signed by the defendant and delivered to said Montague.

Upon these facts the court rendered judgment for the plaintiff to recover the amount of the execution in favor of said bank, it being less than the value of the 350 sheep. To this decision the defendant excepted.

Charles Marsh, for the defendant, admitted that if the action had been assumpsit on the receipt, the defendant would have been restrained from contradicting, by evidence, the actual attachment of the property, and its delivery to him by the officer, but would have been concluded by the terms of the receipt; but he maintained that it was competent to the defendant to go into such showing, and it would be a good defence, in an action of trover.

Property, either absolute or qualified, he contended, was essential to maintain trover. In this case, no such property existed in the officer, as the case shows that the sheep were not actually attached by him, and that he had no possession of them. What is an attachment? Chief Justice Parsons,

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in *Lane & others* v. *Jackson*, 5 Mass. 163, says: "We are of opinion that to constitute an attachment, the officer must have the actual possession and custody of the goods as on a seizure upon execution. To constitute an arrest, the body must be under the control of the officer." In 12 Mass. 497, Parker, J. says: "To constitute an attachment, there must be an actual seizure of the goods by the officer. Not that every article must be taken hold of, but that he must be in view of the whole, with the power of taking possession.

This is a case of mere contract on the part of the defendant, for which the liability incurred by the officer to the creditor, was a sufficient consideration; and defendant, in an action on the contract, would be estopped from denying the existence, and the attachment of the property. But trover involves the question of title; and in this case, the title in the officer was merely fictitious. No case can be found where the plaintiff recovered, in trover, on a fictitious title, and a fictitious conveyance to defendant. In all cases where trover has been sustained, on a receipt for property, taken on attachment or execution, it has appeared that the property was in the actual custody of the officer, and had been delivered to defendant. The case of *Sibley* v. *Storey*, 8 Vt. R. 15, is the first case reported in this state, of trover against a receiptor; and, in that case, the defendant admitted his refusal to deliver the property, when demanded, and claimed it by purchase of the judgment debtor, previous to the attachment.

This case turns upon the question, whether the defendant is prevented, by his receipt, from showing that the plaintiff had no title to the property, and that there could, therefore, be no conversion. Such effect given to the receipt, would be that of an estoppel; but can any writing have that effect, in an action of trespass or trover? From the nature of these actions every question arising in them, is matter *in pais*; and no writing can be given by defendant which will conclude him from going into the merits of the case. Such writing may, indeed, be evidence against him, but is open to explanation, and may be contradicted. If a defendant should even admit, in writing, that he committed the trespass complained of, or converted the goods in question, this

would be mere evidence, or matter *in pais*, and he might show that he was under a mistake. The receipt, in the present case, is evidence, tending to show that the property was attached and delivered to the defendant, and may be explained or rebutted. Being thus open to explanation, the case furnishes one which must be fatal to this action, since it appears that the officer seized no property, and saw none, and therefore delivered none to the defendant, and consequently there could have been no conversion by him.

The officer could not maintain trover against a stranger for this property. He would be met by the objection that he had acquired no right by actual attachment; and it would be no answer to it, to say that Marsh had given him a receipt admitting the attachment. If such receipt would not be evidence of the attachment and delivery in one case, upon what principle can it be made evidence of them in the other?

The action of trover affords no advantage over assumpsit, except in the power it gives the plaintiff to incarcerate the defendant. It is turning a mere contract into a tort, for a purpose abhorrent to the feelings of humanity, and contrary to the spirit of modern legislation.

O. P. Chandler, for plaintiff.

Two questions arise in this case. 1. Whether the evidence offered was admissible to contradict the receipt. 2. Whether, independent of the evidence as against defendant, the evidence offered tended to impeach the attachment, so as to defeat the officer's claim to title by means of it.

I. It was not competent for defendant to offer evidence tending to show no sufficient attachment, as he is concluded by the receipt. *Spencer* v. *Williams*, 2 Vt. R. 212; *Allen* v. *Butler et al.*, 9 do. 122; *Jewett* v. *Torrey*, 11 Mass. R. 219; *Lyman* v. *Lyman*, 11 do. 317.

II. The evidence was not competent, as it did not tend to show the attachment insufficient. The officer took possession of the property through the bailee. Marsh, himself, having possession of the sheep, agreed to keep them. *Sibley* v. *Story*, 8 Vt. R. 18; Story on Bailments, 95.

Justice and policy require the adoption of this rule. The officer is about to attach,—a receipt man is ready to receipt the property,—the intent is to save the expense of an actual

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attachment, by taking other possession; and if, under such circumstances, the receiptor, in an action of *assumpsit*, is not permitted to show the contrary, as ruled in the case of *Sibley* v. *Story*, why should he in this action? If the officer had no special title by means of the attachment, why might not the receiptor show this in an action of assumpsit, to make it appear that he was bound to deliver it to the real owner? Simply because he may not controdict, by parol, his written receipt.

The receipt acknowledges that the goods were in possession of the officer; for receiving them from him implies this. How, then, should defendant be permitted to deny this fact —the only one alleged to be wanting to establish the attachment.

Again: the receipt expresses, in direct terms, that the sheep were attached; and this was, undoubtedly inserted in the receipt, to estop the defendant from denying it; and policy and justice, as well as the rules of law, require that he should be estopped. *Hawes* v. *Watson*, 9 C. L. R. 170; *Harmon* v. *Anderson*, 2 Camp. R. 243; *Stannard* v. *Dunkin*, do. 344; *Chapman* v. *Searle*, 3 Pick. 38; *Parsons* v. *Strong*, 13 Vt. R. 235.

The opinion of the court was delivered by

Royce, J. — The sole question is, whether the action of trover can be sustained upon the facts appearing in this case. That trover will lie, in an ordinary case, in favor of an officer against the receiptor of goods attached, was fully decided by this court in *Sibley* v. *Story*, 8 Vt. R. 15. But it is urged, that, in this instance, there was no sufficient attachment of the sheep, to vest in the officer the requisite legal interest to support this form of action. We are asked to treat the attachment, for the present purpose, as if no such property existed at the time of the alleged service of the writ, — to regard it, in all respects, as a fictitious attachment. And whilst it is conceded that, in this view, it would be sufficient to uphold the *contract* of the receiptors, it is insisted that it cannot subject them in tort.

It is not my purpose to controvert the able argument which has been founded upon this view of the case. Did we consider that the transaction must necessarily be regarded

in this light, I should be disposed to yield to the argument. But we think the attachment ought not to be considered fictitious. The case shows that this defendant actually owned, and had upon his farm, five hundred sheep; that the officer went there to make service of the writ; and that, without requiring the ceremony of going to view the sheep, or separating the flock, the defendant, and another person, executed a receipt for 350 of the sheep, which the officer returned, as being attached upon the writ. Now there is no doubt but that the legal requisites of a valid attachment are such as the counsel has contended for. It is nothing less than the actual seizure of property, or having it within the power and control of the officer. But this definition is framed with reference to an attachment, in the strict sense of a proceeding altogether *in invitum*, — the power of the law operating against the will, or without the concurrence, of the party affected by it. As against an unwilling party, or a third person, whose rights are affected, it must, doubtless, conform to this description. It is competent, however, for a party to dispense with forms or ceremonies which he might have insisted on, and still leave the attachment effectual as against himself. He may consent to be treated as being under arrest, when the officer has not acquired the actual control of his person; and so he may consent that his goods shall be treated as being attached, when the officer has not actually seized them. In each case it is but submitting to the power of the law, without constraint. And if, under such circumstances, the officer returns the arrest, or attachment, with the party's assent, that return should be, as it legally is, conclusive evidence of the fact. And if the principle here advanced be a sound and just one, the present is surely a strong case in illustration of it. The property did exist, and was attachable; and but for the voluntary arrangement between the defendant and the officer, it would have been regularly seized and removed. But the defendant chose to have it treated as being attached, (waiving the ceremony of actual seizure and removal,) and undertook to keep it for the officer, who, with his assent, charged himself with a liability for it. He cannot now say, that his subsequent possession of the property was not subservient to the officer's right. It appears that the property was afterwards duly demanded,

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but, having been previously disposed of, was not restored. We think, that upon such a state of facts, the action of trover can be maintained. Judgment of county court affirmed.

Hugh Henry v. Town of Chester.

Mere circumstantial errors in the details of making up the grand list, will not render it void, as a basis of taxation.

The list will not be rendered void by any error of judgment in the listers, in a matter properly within their discretion.

If the appraisal of real estate by the listers be not submitted to the supervision of the county and state committees, or if such alterations as they require, are not made, the list is incomplete, and an assessment of taxes thereon, void.

The persons who may have been compelled to pay taxes to the town, assessed upon such list, may recover back the full amount, in an action of assumpsit for money had and received.

This was an action of assumpsit, for money had and received.

Plea, non assumpsit, and issue to the court.

By consent of the parties, the case was referred to a commissioner, to make report of facts.

The commissioner reported, among other things, that the plaintiff's claim rested on the ground that the town of Chester had collected from him a large amount of taxes which had been assessed upon his property, in connexion with a general list of the town, improperly made up, in that the addition to the appraisal of houses and lots, which had been adjudged by the county averaging committee, and the addition to the appraisal of lands, adjudged by the state averaging committee, had not been made by the listers, although the same had been seasonably certified to them, while ten per cent. was deducted from the original appraisal of buildings and lots — by reason whereof, the taxable property of the plaintiff, consisting principally of personal estate, had been subjected to a disproportionate assessment in making up the taxes for said town.*

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* The reporter has not been furnished with a copy of the commissioners report, which he learns from the judge who gave the opinion, was not furnished to the court, being voluminous, and principally occupied with a detail of facts in regard to the making up of the list, and its effect upon the plaintiff. The above statement is drawn from the opinion of the court, and would seem to embrace all the facts on which the leading point in the case turned.

The plaintiff insisted that, upon the facts reported, he was entitled to recover the amount of the taxes paid by him to the town, as stated in the report, together with the interest thereon, amounting to $736.36. The court rendered judgment in favor of the plaintiff, for the said sum; to which decision the defendant excepted.

D. Kellogg, *C. Coolidge*, and *J. Collamer*, for defendant.

I. The proceedings of all tribunals, or authorities, acting within the sphere of their jurisdiction, and good on their face, are never *void*, as to third persons, however *irregular or voidable*. When the action is by, or against, the person exercising such authority, then the regularity of its exercise may be questioned; and, also, when proceedings are taken to avoid or correct such proceedings—as error, *certiorari*, *quo warranto*, &c. One example will suffice to illustrate this principle — viz, that of military officers assessing and collecting fines. If the person is exempt, permanently, from duty, or not living within the beat of the officer, he is not subject to his jurisdiction, and all proceedings in such case are *coram non judice*; and the officer, and all acting on his authority, are wrong doers. But if the person be subject to his jurisdiction, the irregularity of the proceedings will not vitiate them or affect third persons.

So far have courts carried this, that all proceedings of officers, *de facto*, are held good as to third persons, however defective are the qualifications of such officers. Our court has held that an acting justice, though when appointed, and still, post-master, may proceed with a cause, though this be objected, in the first stage, in abatement.

II. The listers have the jurisdiction of making up, and completing the grand list; and all real estate situated in the town, and all persons residing in it, with their personal property are the *subject matter*, and, while so situated, are within the jurisdiction of the listers for that purpose; and no matter of error, or overcharge, or putting too much into the list, as to a man *residing in town*, will render the proceeding *void*, or, in any way, affect any persons except the listers themselves. This is true in the analogy of legal principles, and is the only practicable method of carrying into effect the

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listing law, and many other of our important municipal regulations. Particularly must this be so, in all cases where the proceedings are *apparently* regular.

III. In this case, the list was good on its face. The plaintiffs' land was in the town, and he there resided, and therefore the whole subject matter was within the jurisdiction of the listers.

The particular neglect now complained of, that is, not adding the ordered per centage to the land and buildings, is in no sense different from a neglect to put in a farm, or even personal property of a resident. It is insisted by the plaintiff, that it is different, and more important, because the statute provides that after the averages are made by the committees, then the listers shall proceed to *finish* their lists as a previous section had directed. We cannot see the force of the argument. It is indeed true, that it is the last act that finishes anything, but that is not, therefore, of any more importance than any other act in the process. The statute uses the words, "Shall then proceed to finish the lists," &c., only as matter consecutive, as they could not, till then, complete them or return them to the town clerk's office, as before directed.

IV. We insist there is no adjudged case to sustain the doctrine that the list is, for such a cause, *void*.

In examining the cases in Massachusetts, it is to be recollected that, there, the assessors make the list, and, also, assess the tax; and, therefore, if they proceed unlawfully, in either, trespass may be sustained against them. All the cases in Massachusetts, against assessors, and all actions on the case in Connecticut and Vermont, against listers, do not, at all, assist the plaintiff in this action, for we grant he could have such action here against the listers, for any neglect of duty, to recover all he has lost thereby. The cases of *Lillie* v. *Burnham*, 15 Mass. 144, and *Thayer* v. *Stearns*, 1 Pick. 482, were both against the assessors, and, of course, do not sustain this action.

The cases in 10 Mass. R. 514, and 17 do. 461, were against towns, but the judgments were under a rule, by consent, and the point was, that a corporation was not subject to pay a tax on personal property; that is, was not in the jurisdiction of the assessors to be taxed at all. On neither of

these points are they any authority for the plaintiff. The case of *Sumner* v. *Dorchester*, 4 Pick. 361, was a judgment against a religious society, for a tax collected of a man never a member, and so never within the jurisdiction. The case of *Preston* v. *Boston*, 12 Pick. 7, was a judgment for a tax collected of a man, on personal property, he never residing in the city; and in that case it was held that for overcharge, as in this case, an action would not lie against the city. The case of *Nelson* v. *Medford*, 7 Pick. 18, was an action on the vote of the town, to repay the lister what he paid out to those who complained of the tax, and does not affect this case. *Little* v. *Merritt*, 10 Pick. 543, was an action *against assessors*; and besides, it decides that no action could be maintained against the school district who received the money.

As to the cases in Connecticut:—*Atwater* v. *Woodbridge*, 6 Conn. R. 223, was an action against a town for a tax collected on a list against a religious society, not subject to any tax, and so not in the jurisdiction of the listers. The case in 7 Conn. R. 550, was trespass against the selectmen—they having assessed a tax on an unlawful list, inasmuch as the listers did not return their list in time for plaintiff to appeal to the board of relief. This is an extraordinary case, but *clearly* does not sustain this case. In *Adams* v. *Litchfield*, 10 Conn. R. 127, the list was, as it respects the plaintiff, defective on its face, as the court held the $5000, added by the board of appeal, not specific enough to call it money at interest, and so the selectmen had no power to assess the tax thereon, and it was, therefore, void. *Landon* v. *Litchfield*, 11 Conn. R. 251, was against the town, for a tax collected on land exempt, so that the subject-matter was not within the jurisdiction of the listers.

The plaintiff cites *Jamaica* v. *Guilford*, 2 Chip. R. 103; *Brookline* v. *Westminster*, 4 Vt. R. 224; and *Poultney* v. *Wells*, 1 Aik. R. 180. Perhaps these are cited to show that, in an equitable case, *indebitatus assumpsit* should be sustained against a town. But this is not an equitable case as against the defendant, because — 1. Plaintiff claims to recover all he has paid, and to avoid, entirely, contributing to the taxes. 2. It is inequitable that the defendant should pay, as the town has no mode of redress except to assess the

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amount paid, on the new inhabitants, who will have received no part of the money. 3. The town has received, in the whole, no more money than if the additions had been made to the list. 4. If the plaintiff can recover, every man in town can recover, and thus the taxes of five years will be thrown onto the present and future inhabitants. Such, and even worse, must be the effect of holding this list *void*.

V. The person, and subject-matter, being within the jurisdiction of the listers, and the list apparently perfect, the only remedy is for neglect or misfeasance against the listers.

VI. But even if the list was void, in the action for money had and received, the plaintiff should recover only what the defendants could not equitably retain — that is, the part only which he should not have paid.

VII. But the payments by the plaintiff were *voluntary*, and not under any protest, and therefore not recoverable. *Colman* v. *Anderson*, 10 Mass. R. 105; *Salem* v. *Danvers*, do. 518; *Adam* v. *Litchfield*, 10 Conn. R. 127; *Preston* v. *City of Boston*, 12 Pick. 7.

Tracy & Converse, and *Peck*, for plaintiff.

1. The neglect of the listers to add the sums ordered by the county and state averaging committees to the list of 1832 made *void* that list, and all subsequent proceedings founded thereon. Until these additions were made, the list was *inchoate*, and taxes could not be assessed upon it. Revised Statutes, 545, §18; *Thames Man. Comp.* v. *Lathrop et al.* 7 Conn. R. 550; *Sibley* v. *Burnham et al.*, 15 Mass. R. 144; *Thayer* v. *Stearns*, 1 Pick. 482; *Thurston* v. *Little et al.*, 3 Mass. 429; *Torrey* v. *Millbury*, 21 Pick. 64.

2. The legality of a tax may be tried in this form of action, and if it is shown that the tax is *void*, the amount may be recovered back. *Jamaica* v. *Guilford*, 2 D. Chip. 103; *Poultney* v. *Wells*, 1 Aik. 180; *Brookline* v. *Westminster*, 4 Vt. R. 224; *Stevenson* v. *Mortimer*, Cowp. 805; *Salem Iron Factory Co.* v. *Danvers*, 10 Mass. R. 514; *Amesbury Man. Co.* v. *Amesbury* 17 do. 461; *Sumner* v. *Town of Dorchester*, 4 Pick. 861; *Inglee* v. *Bosworth*, 5 Pick. 498; *Nelson* v. *Milford*, 7 do. 18; *Little* v. *Merrill*, 10 do. 543; *Preston* v. *Boston*, 12 do. 7; *Baker* v. *Allen et al.*, 21 do. 382; *Joy* v. *County of Oxford*, 3 Greenl. 131; *Gardiner*

Fac. Co. v. *Gardiner*, 5 do. 133; *Atwater* v. *Town of Woodbridge*, 6 Conn. R. 223; *Adam* v. *Town of Litchfield*, 10 do. 127; *Landon* v. *same*, 11 do. 251.

3. But if it were held that the list was not *void*, still, the plaintiff may recover what he has been compelled to pay, over and above his proportion of the taxes, as the town, in justice and equity, have no right to retain it. Listers and selectmen are the agents of their respective towns, and the towns are responsible for their acts and omissions, while acting within the scope of their agency. By the neglect of duty on the part of the listers of Chester, the plaintiff has been compelled to pay more than his due proportion of the taxes of that town; and now it is insisted that, although the town have had and used the plaintiff's money, they are not liable for it, and that his only remedy is against the listers, who may be dead or insolvent. This cannot be law. *Clark* v. *Corporation of Washington*, 12 Wheaton, 40.

4. The payment of the taxes was not *voluntary*. When demanded they were paid to the collector, who had rate bills and warrants, regular on their face, authorizing their collection. The plaintiff could not test their validity, nor prevent the officer's taking his person or property for the amount, without payment. When *mesne process* is served on one, and he pays a sum of money to compromise the claim, as a general rule, he cannot recover back the amount thus paid, however unfounded the claim, as the law which creates the pressure supplies the defence. Instead of paying the money, he should contest the plaintiff's right to it, by defending the action. But when a payment is made on a process in which the *right* cannot be tried, the principle does not apply. The true principle seems to be this — that when money is paid to an officer on a warrant, or any final process, regular on its face, and on which payment may be enforced by a levy on the person or property, such payment must be treated as *compulsory*. *Amesbury W. & C. Man. Co.* v. *Amesbury*, 17 Mass. R. 461; *Preston* v. *City of Boston*, 12 Pick. 7; *Hill* v. *Street*, 5 Bing. 37; 15 C. L. R. 358; *Snowden* v. *Davis*, 1 Taunt. 358: *Irving* v. *Willson*, 4 Term R. 485; *Lewis* v. *Hammond*, 2 B. & Ad. 206; *Stevenson* v. *Mortimer*, Cowp. 805; *Cadaval* v. *Collins*, 4 Ad. & Ellis, 858; 31 C. L. R. 206; *Duper* v. *Keeling*, 4 C. & P. 102; 19 C.

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L. R. 295; *Morgan* v. *Palmer*, 2 B. & C. 729; 9 C. L. R. 232; *Smith* v. *Caff*, 6 M. & S. 160, cited by Kelly in *Willson* v. *Ray*, 10 Ad. & Ellis, 82; 37 C. L. R. 51; *Chase* v. *Dromwell*, 7 Greenl. 134; *Bates* v. *Thr. U. G. In. Co.*, 3 Johns. Cas. 238; *Ripley* v. *Gelsten*, 9 Johns. R. 201; *Clinton* v. *Strong*, do. 370.

5. When the plaintiff paid the taxes, he had no knowledge of the *illegality* of the lists, nor could he have ascertained, by mere inspection, that the additions had not been made as ordered. The payment, then, was made under a *mistake* of the facts; that is to say, without any knowledge that the lists had not been corrected. On this ground, the plaintiff has a right to recover. *Miles* v. *Duncan*, 6 B. & C. 671; 13 C. L. R. 293; *Whitcomb* v. *Williams*, 4 Pick. 228; *Wait* v. *Leggett*, 8 Conn. 195; *Franklin Bank* v. *Raymond*, 3 Wend. 69; *Burr* v. *Verder*, do. 412; *Hodgson* v. *Williams*, 6 Esp. Cas. 29; *Canal Bank* v. *Bank of Albany*, 1 Hill's R. 287; *Walker* v. *Hill*, 17 Mass. 380.

6. No demand on the town for the repayment of the taxes was required to enable the plaintiff to sustain this action. *Utica Bank* v. *Van Gensen*, 18 Johns. R. 485.

The opinion of the court was delivered by

Redfield, J. — The power of taxation, although a necessary attribute of the sovereignty, in all governments, is, to some extent, an arbitrary power, as well in free governments, as in those whose powers are less strictly defined; and is, by consequence, more or less subject to abuse. This power is, however, necessary to the very existence of any political organization, sufficiently efficient to answer the ends of all municipal authority—the just protection of civil rights, the most important of which are life, liberty, and property,—for, without the power of coercion, protection would be impossible. Taxation, too, as one of the principal sources of the power of coercion, must be, to some extent, discretionary in the legislature; so that, if any particular subject is fairly within the power of taxation, it is competent for the legislature, by general laws, to impose taxes to an indefinite extent—even to the prohibition or annihilation of any given species of property. The inequality or injustice of any system of taxation, established by the legislature, is no ground

of declaring it void, as was conceded in the case of *M'Culloch* v. *State of Maryland*, 4 Pet. Cond. R. 487, by Ch. J. Marshall. "That the power to tax involves the power to destroy, is a proposition not to be denied."

The necessity of such a power in all governments, and the difficulty of restraining its abuse, by constitutional checks, render the duty of courts, in relation to the subject, always delicate and difficult. In the present case, however, we are not called to decide whether any, and if any, what limits it is competent for the courts to impose upon the legislature in regard to this subject. The only question to be here determined is, how far the mode and manner of taxation, prescribed by the legislature, is necessary to be pursued by the subordinate municipal authorities, in order to the legality of assessments and collections, made by them.

The only mode of taxation allowed by the legislature to the several towns, is by vote, and assessment upon the list of the polls and rateable estate of the citizens; such lists to be perfected, in a prescribed time, and manner. Now, we are by no means prepared to say, that the legality of a tax is, in any way, affected by any mere circumstantial error or defect in the detail of the items, which go to make up the entire grand list of the town. Such a doctrine would render legal taxation extremely difficult, if not impossible. More or less property subject to taxation will always be omitted, and this will, to some extent, increase the burdens of all the other tax-payers. Nor will the tax be rendered void by reason of the manner in which any matter is determined by the listers, if such matter rests fairly within their legitimate discretion. For instance, in making appraisals, or in determining other matters properly referrible to their discretion, suitable allowance is to be made for the varieties, as well as the errors, of judgment, which occur in all matters of this kind. Such determinations are final, being made by law, subject to no revision here.

But, in regard to those matters which rested primarily in the discretion of the listers, but were made subject to revision by another board, and when the supervision of this superior board was made indispensable to the perfecting of the list, the determination of the listers alone was of no avail.

It is indispensable to the legality of any tax imposed by

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the town, that it should have been made upon a list of the polls and rateable estate of the inhabitants, in substantial and *bona fide* compliance with the requisitions of the statute. By the statute in force at the time of making the list in this case, the listers are required first to make an appraisal of the improved real estate in the several towns, distinguishing the land from the buildings and building lots. This appraisal is then to be revised and equalized by a delegation of listers of the several towns throughout the county; and when such county convention order alterations in any of the towns, they are to certify them to the listers of such towns. This appraisal, thus corrected, is subject to a further revision by a committee of the legislature, and any alterations required by them to be made, are to be certified in like manner to the listers. This appraisal, thus completed, forms the basis of taxation of real estate for five years. The county committee, in the present case, required ten per cent. to be added to the appraisal of buildings and lots in the town of Chester; and the state committee required fifteen per cent. to be added to the appraisal of land throughout the county of Windsor—both of which requisitions were properly certified to the listers of Chester, in time for them to have made the proper additions before the tenth of December, when the list was required to be completed. The addition, both of the ten per cent. on buildings and lots, and of the fifteen per cent. on land, was wholly omitted, and ten per cent. was deducted from the original appraisal of buildings and lots. In this state the list was returned to the office of the town clerk, and taxes assessed upon it. As the plaintiff's list was mostly for personal property, he was very considerably affected by such omissions and alterations.

Upon two grounds, then, we think this was a void list. 1. The plain and obvious requisitions of the statute, in regard to the manner of making up the list, were disregarded, both by important and essential *omissions*, and by *arbitrary additions*, without even the color of right or legal warrant. If this may be done and still the list be regarded as legal, so might it with equal propriety, if the entire real estate in town were omitted, or inserted wholly at random, without even the form of an appraisal. The proceedings of the listers are, in the present case, something worse than an

omission to return their appraisal to the county or state committee for revision—which, by statute, is made indispensable to its binding force.

2. The list was not *complete*, until the alterations, required by the county and state committees, were made. Until that time, it was merely in an inchoate state—so imperfect, as no more to form the basis of any legal tax, than if it had been returned at any former stage in its progress.

We have not thought it necessary to examine in detail, the numerous cases read at the bar. They seem all to concur in the principle above stated, and which is expressed by Ch. J. Shaw, in *Torrey* v. *Millbury*, 21 Pick. 65: "One rule is very plain, and well settled, that all those measures, which are intended for the security of the citizen, for securing an equality of taxation," &c. "are *conditions precedent;* and if they are not observed, he is not legally taxed, and he may resist it." I would add, as a further qualification of the general proposition, here laid down, that these "measures," in order to become "conditions precedent," must be such matters as enter into the framework of the assessment, and affect its principle, and not its details merely. The mistakes which occurred in footing the list, in the present case, although sufficiently obvious, and injuriously affecting the plaintiff's interest, we have not been able to consider important to the legality of the taxes assessed on such list. So, too, the list not being returned to the town clerk's office, in the year 1834, until after the tenth of December, notwithstanding the cases of *Thurston* v. *Little*, 3 Mass. R. 429, *Thames Man. Co.* v. *Lathrop*, 7 Conn. 550, and *Thayer* v. *Stearns*, 1 Pick. 482, we should hesitate to pronounce any just ground of declaring all taxes, assessed thereon, void. So, too, the appraising of an acknowledged less number of acres than should have been, and on that account proportionably raising the rate of appraisal, although a departure from the requirements of the statute, relates to matters resting wholly in the discretion of the listers, in the first instance.

We come, now, to consider the remaining arguments urged against the recovery in this particular action, which is assumpsit for money had and received, and in favor of the proposition that, if a recovery can be had in this form of ac-

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tion, it should only be for the excess, paid by the plaintiff, above what would have been his just proportion of the legal taxes.

In regard to the propriety of this remedy we entertain no doubt. Money, the payment of which is coerced under any color of authority, which proves void, may always be recovered in this form of action. In regard to money collected under final process, it cannot be recovered until the judgment, for the enforcement of which such process issued, is reversed; and then it may always be recovered in this form of action, as is every day's practice. In regard to money paid under tax warrants, where the taxes are illegal, the question may always be tried directly, in an action for the money, against the corporation who hold it, or trespass against the collector or selectmen. *Adam* v. *Town of Litchfield*, 10 Conn. R. 127; *Preston* v. *City of Boston*, 12 Pick. R. 7; 7 Conn. R. 550; *Amesbury Man. Co.* v. *Amesbury*, 17 Mass. R. 461; 4 Pick. 361; and many other cases cited by counsel.

But it is urged that such recovery cannot be had until after demand and refusal to pay the money. No case is read which goes this length; and, in principle, we think it unnecessary and unreasonable. The recovery here goes upon the ground that the payment was coerced by color of an authority in law, which was, in fact, always void. The law, in such case, implies a promise to pay back the money presently. Interest is recoverable thereon, and the statute of limitations begins to run from the time of payment. This view sufficiently answers another objection, i. e. that the payment on the part of the plaintiff was voluntary.

Upon the question, whether the plaintiff shall here recover the whole amount of taxes paid, although, in some sense, that operates severely upon the town, we have not been able to find any middle course, which, in principle, we could justify. The recovery goes upon the ground, that the list was imperfect, irregular, and defective, and wholly void. The assessment was, therefore, void. The town, which acts only through its agents and officers, and by its votes, is affected by all acts of its officers, within the general scope of their duties. If it were not so, they might escape all legal, as well as moral, responsibility; and, from being esteemed soulless—

as, indeed, of necessity, they are—they would become wholly irresponsible. The tax being void, then, they should not retain the money, or any part of it. Towns have no legal claim upon the citizen to contribute to the public burdens, except in a prescribed mode—by compelling the payment of legal taxes. This, in the case of the plaintiff, they have voluntarily foregone, in attempting to impose upon him an illegal tax. We consider the remedy here afforded, of suffering the plaintiff to recover the entire sum thus wrongfully taken from him, but a simple act of justice; and if the form of the redress operates severely upon the defendant, it is but a salutary and necessary restraint upon the disregarding, by public officers, of the plain and obvious provisions of so important a statute, as that regulating the entire subject of taxation in the state.

It has been said the consequence of such a decision, as we here make, will be fearful. I apprehend no such consequences. Few such cases have occurred, or will occur; and if they do occur, whether more or less seldom, it is better, we think, that this wholesome remedy be applied to them, than that they be suffered to multiply without redress, or rebuke.

Judgment affirmed.

JOHN D. POWERS v. JAMES SOUTHGATE and WIFE.

A promise by the husband, that he will see a debt paid, which the wife owed when sole, and which is barred by the statute of limitations, will not remove the statute bar, in a suit against husband and wife.

THIS was an action of book account, appealed from a justice of the peace. Upon its entry in the county court, a judgment to account was rendered, and an auditor appointed.

It appeared, from the auditor's report, that the plaintiff exhibited an account against the defendants for medical services rendered to the wife of said Southgate, when sole, more than six years before the bringing of the suit; that the defendants plead the statute of limitations, to which the plaintiff replied a promise by the said James Southgate,

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within six years and after the marriage, to pay the amount of the account; that the auditor admitted the testimony offered to prove said promise, and that the facts proved by the testimony were —

"That a little over two years ago, the witness, as the agent 'of the plaintiff, met the said James Southgate, and told 'him that the plaintiff had a claim against his (Southgate's) 'wife, and asked said Southgate if he would see that it was 'paid; and said Southgate said he would, and said that he 'would pay it. The witness said to Southgate — "if you 'will say that the debt shall be paid, that is enough"; and 'said Southgate said he would."

The auditor, upon this statement of facts, submitted to the court whether the plaintiff ought to recover.

The court rendered judgment for the defendants. The plaintiff excepted.

O. P. Chandler, for plaintiff.

It may be considered as now settled, that the statute of limitations contemplates the contract as still subsisting, though the remedy has been taken away, — establishing a legal presumption of payment, and a loss of the means of defence, which presumption may be rebutted by the acknowledgment of the party; and this is sufficient, though it be a mere admission, made in the presence of a third person. *Quantock* v. *England*, 5 Burr. 2630; *Whitney* v. *Bigelow*, 4 Pick. 113; *Patterson* v. *Choat*, 7 Wend. 445; *Baxter* v. *Penniman*, 8 Mass. 134; *Gailer* v. *Grinnell*, 2 Aik 352; *Olcott* v. *Scales*, 3 Vt. 176; *Barton* v. *Bellany*, 7 Vt. 56; *Phelps* v. *Stewart*, 12 Vt. 264; *Alexander* v. *Hutchinson*, Hank's R. 535.

If any new promise, or direct undertaking were necessary, to constitute the foundation for the suit, as the cause of action, it is admitted that such promise cannot be predicated of the wife, during coverture, and the action being joint it must fail; and on this ground, alone, did the court put the question in the case of *Pittam* v. *Foster et al.*, 8 Com. L. 67.

The admission by the husband revives the debt as to both, for the reason that the admission of one of several, having a community of interest, will bind all. Thus, the admission

of one of two parties in a suit, one of two joint grantors, one of two joint executors, one of several joint debtors, composing a voluntary association, binds the whole. 7 Wend. 125; *Johnson* v. *Beardsley*, 15 Johns. R. 3; *White* v. *Hale*, 3 Pick. 292. Admission by one partner, after dissolution, is sufficient to take the case out of the statute, though not to establish an original liability. 7 Wend. 441.

Payment by one of several, on a joint and several note, takes the case out of the statute. *Burleigh* v. *Scott*, 15 Com. L. 151; *Pease* v. *Hirst*, 21 Com. L. 40; *Howard* v. *Shumway*, 13 Vt. 358. During the coverture, the debt is, in fact, the debt of the husband, and the wife is joined to save the remedies against her, in the event of his decease. In *Lockwood* v. *Luther*, 27 Com. Law. 82, it is held, that a discharge of the husband under the insolvent law, discharges the wife, and that, during coverture, the debt is that of the husband. During coverture, the identity of the wife is so far merged in that of the husband that he acts for her in respect to her liabilities.

Tracy & Converse, for defendants.

I. Unless the husband's promise revives the debt against the wife, this suit cannot be sustained. And upon what principle can it revive the debt, as against her? Obviously no other, than that he acted as her agent. But she could not, herself, make a promise which would bind her; and therefore, there could not be, either expressly or by implication, any delegation of authority by her to another to do it. And besides, if the husband had power, as the agent of the wife, to bind her, the promise should have been made in her name. But it was made neither in her name, nor by her authority.

II. But this case has been likened to that of partners or joint signers of notes, where the acknowledgement by one, revives the debt against all. There is no analogy between the cases. If the husband and wife are partners, then the wife should be holden for all the debts he contracts, and be responsible for all the promises he makes during coverture. He, also, should be bound by her acknowledgement of a debt against him. The wife, after marriage, has no control over the property of her husband; and however much she

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brought into the *partnership concern*, she has the control of none of it — cannot even take it to pay her own debts, without her husband's consent; neither can she control any property she acquires during coverture. If the doctrine contended for on the other side, is correct, then the husband could, by his own act, entail debts upon his wife, when at the same time, she could command no property with which to pay them, although the husband may possess thousands, actually received from her.

We are unable to find any adjudged case to sustain this suit. The case of *Pittam* v. *Foster*, 8 Com. L. R. is against it.

The opinion of the court was delivered by

Bennett, J. — The question presented for our consideration is, whether the declaration of Southgate to the agent of the plaintiff, that he would see the amount paid, removed the statute bar, which had then run upon the account. To enable the plaintiff to recover in this action, the bar must be removed, both as to husband and wife. In *Whitcomb* v. *Whitney*, Doug. R. 651, it was held, that the admission of one of two joint and several promisors, took the case out of the statute as to both. Though the soundness of this case has been frequently questioned, and is opposed to a case in Ventris, yet it has been followed by subsequent cases in England, and the same case has been recognised, as good authority in this state, in the case of *Joslyn* v. *Smith*, 13 Vt. R. 353. It has been frequently said by judges, however, that it ought not to be extended. The principle upon which part payment, or other admission of one, is allowed to affect other parties jointly indebted with the person who makes the admission, is the community of interest between them, by reason of which the act of one, in legal contemplation, is the act of all. I am not aware that it has ever been attempted to extend this principle to a case where the promise or obligation was only *several*, and not either joint, or joint and several. Though the obligation may have been *joint*, yet, when the community of interest has once *ceased*, the principle *ceases* to have application. Hence, in the case of *Atkins* v. *Tredgold*, 9 C. L. R. 12, it was held, that after the death of one of two joint, or joint and several contractors,

his executors cannot be prejudiced or made liable, by a part payment by the survivor, after the lapse of six years.

If the promise of the husband, that he would see the debt paid, removes the statute bar, as against husband and wife, it must have the same effect if the wife be sued alone for the debt, upon the death of the husband. But the husband and wife are not *joint* contractors. The debt is not a *joint* debt against husband and wife; but remains, after marriage, the debt of the wife. The husband is not made chargeable for the debt of the wife during coverture, upon the principle that the marriage makes it his debt. If he dies first, the debt does not survive against his representatives, whether the husband, by the marriage, acquired a property with the wife or not. The reason assigned in the books why the husband, while living, should be a party to the suit with the wife is, that judgment may be against both, as the wife cannot be imprisoned upon a civil process alone, without a violation of the marital rights. For myself, then, I think it is clear, that the husband's admission cannot remove the bar as to the wife, upon the ground that they are joint promisors or debtors.

But it may be thought that the husband acts as the agent of the wife, and that, consequently, his admissions should bind the wife. But whence does he derive his authority? It is not, I think, one of the marital rights, flowing from the marriage. These are all well defined; and it has never been heard of, that among these is to be found the right in the husband, by his admissions, to remove a statute bar, which, otherwise, might avail the wife, not only during the husband's liability, but after that may have ceased.

While under coverture, the wife can make no promise which will be obligatory upon her; and much less can she appoint an agent to make one for her. In the case of *Axson* v. *Blakely*, 2 McCord's R. 5, it was expressly adjudged that the promise of the wife, after marriage, to pay a debt contracted while sole, will not take the case out of the statute. So in *Pittam* v. *Foster & Norris and his wife*, 8 C. L. R. 67. Foster, and the wife of Norris, while sole, had executed a joint note, and it was held that the admissions of Foster, after the intermarriage of Norris and his wife, would not take the case out of the statute as against Norris and his

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wife. The case proceeds upon the ground that a promise by the wife, made after marriage, could not be available; and consequently she cannot be prejudiced by the admissions of her co-contractor. To take a case out of the statute, there must be an admission of the debt, accompanied with a willingness to pay it, or at least, not with an unwillingness. As an individual member of this court, I think that Southgate had no authority, either, as derived from a community of interest, as in the case of joint contractors, or from the marriage tie, or from any authority subsequently, by implication, derived from the wife, to make any admissions which should defeat the wife of the benefit of the statute, if sued after the death of her husband, or the husband and wife when both are sued for her debt, as is now the case. These grounds are sufficient, in my view, for affirming the judgment of the county court.

But, as the auditor finds the facts, Southgate did not undertake or promise, for the wife, or for himself and his wife, to see the debt paid; but it is, by its very terms, his sole promise. Some of my brethren, who concur in the result, think the case should stand upon this ground. If it should be objected, as a result of this doctrine, that it creates difficulties in suing, where a feme covert is debtor, and the statute has run; it is, in my opinion, a sufficient answer to such objection to say that that is no reason why a statute, which has eminently been styled a statute of repose, and which had its foundation in part, as it is said, in the civil law, as a punishment for the negligence of the creditor, should not have its effect.

The plaintiff might sue at an earlier day. In the case before us the claim is of some fifteen years standing.

It is possible an action might have been maintained on the promise, against Southgate alone; but this is a point not before the court, and no opinion is expressed upon it.

Judgment of the county court is affirmed.

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JOHN STIMSON *v.* JACOB A. CUMMINGS.

Stimson v. Cummings.

Certain notes of hand having been delivered by S. C. to S. as an indemnity, and the same having come into the hands of, and been collected by, J. C., it was held, in an action in favor of S., against J. C., to recover the amount thus collected, that S. C. was not a competent witness to prove that the notes had been obtained by him, with the consent of the attorney holding them for collection, and had been sold by him to the defendant for a valuable consideration.

This was an action of assumpsit, for money had and received.

Plea, general issue, and trial by jury.

On trial, the plaintiff gave evidence tending to prove, that one Stephen Cummings delivered to the plaintiff several notes of hand, to the amount of about four thousand dollars, to collect, and from the avails thereof, to pay and indemnify himself for liabilities he had incurred at the request of the said Stephen, and next, in trust, to pay and indemnify one Pliny Parker for his liabilities for said Stephen, and the remainder, or residue to be returned to said Stephen; that, the plaintiff not being fully paid, nor said Parker, a part of said notes were, without the consent of the plaintiff, eloigned, and that the defendant had possession of the same, and had collected the money on a part thereof. The defendant then offered the said Stephen Cummings to prove that he obtained possession of a part of said notes, by the consent of the attorney, who held the same, and delivered to the defendant a part thereof; and that the defendant purchased the same of him, in good faith, and for good consideration; and that these were all he had collected. The plaintiff objected to the said Stephen as an incompetent witness, on account of interest, but the court overruled the objection and admitted the witness.

The jury returned a verdict for the defendant. To the decision of the court admitting the witness, the plaintiff excepted.

R. Washburn, for the plaintiff, contended,

1. That, in case of a recovery by the plaintiff against the defendant, the witness would be liable to the defendant on his implied warranty that he was the owner of the notes.

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1 Swift's Dig. 384; 2 Kent's Com. 478; *Medina* v. *Stoughton*, 1 Salk. 210.

2. That the interest of the witness was not balanced, because in case of a recovery by the plaintiff, against the defendant, the witness would not only be liable to the defendant for the amount of damages, but, also, for the costs of this suit. *Lewis* v. *Peake*, 7 Taunton, 153, (2 C. L. R. 54,); *Pitkin* v. *Leavitt*, 13 Vt. R. 379; *Marquand* v. *Webb*, 16 Johns. R. 89; *Butler* v. *Warren*, 11 Johns. R. 57.

3. That the witness was not competent to prove the defendant's title to the notes. *Parker* v. *Hammond*, 13 Vt. R. 242; 1 Sw. Dig. 782; 3 Stark. Ev. 1647.

Tracy & Converse and *C. French*, for the defendant.

The plaintiff held the notes merely as the trustee of the witness, who placed them in his hands voluntarily, and could recall them when he saw fit, and dispose of them as he chose. But should it be determined that the plaintiff has a right to maintain this action against Jacob A. Cummings, and he recovers in the suit, and thereby imposes a legal obligation on the witness, to the defendant, to the amount of the judgment thus obtained, the witness is not affected by such judgment, in any other manner than by the mere changing of his liability from the plaintiff to the defendant. If the defendant recover his costs, the witness' liability to the plaintiff remains unchanged. He was liable to the plaintiff when he delivered him the notes; and if he has taken them away before the liability was discharged, if the plaintiff can recover at all, he can recover no more than his claim against the witness; and might not so much, if the notes delivered to the defendant were of a less amount. Where, then, is the interest that shall exclude him from testifying for the defendant?

The opinion of the court was delivered by

Hebard, J.—The defendant, to relieve himself from the imputation of having improperly obtained possession of the notes, offered the witness, Stephen Cummings, " to prove that he obtained possession of a part of said notes from the attorney who held them, and delivered to the defendant a

part thereof; and that defendant purchased the same of him in good faith, and for good consideration, and these were all he had collected."

The same principle that is involved in this case, was decided in the case of *Parker* v. *Hammond*, 13 Vt. R. 242; and little need be said in illustration of this case more than to refer to that.

It is a well settled principle of law, that, upon the sale of a chattel, the vendor warrants the title, and, in the case of a failure of title, upon suit brought, the measure of damage is the value of the chattel, and the cost of the former suit. *Lewis* v. *Peake*, 7 Taunton, 153.

The same doctrine is laid down in 3 Stark. Ev. 1647, that "a witness who is answerable to vendee, in case the title turn out to be defective, is not competent to support the title in an action against his vendee, founded on an alleged defect of title." If the plaintiff recovers in this suit, the defendant's claim upon the witness would be for the amount of the notes, and the cost of this suit. 2 Stark. Ev. 894. Stephen Cummings, having obtained these notes through the agency or permission of the attorney, would be liable to the plaintiff for the amount, whereas, having sold them to the defendant, with an implied warranty of title, at least, he would be liable to the defendant, on failure of title, in the amount of the notes, and the cost of this suit. He, therefore, has a preponderance of interest in favor of the defendant, and was not competent without a discharge.

Judgment reversed.

NATHANIEL PINGREY v. JOEL G. WATKINS.

A landlord may declare against an assignee of his lessee, for a share of the rent reserved in the lease, proportioned to the relative value of the part held by assignment.

Quære—Whether, upon an allegation that all the estate, interest, &c. of the lessee came by assignment, to the defendant, proof that part only of the leasehold premises was assigned, is a variance.

A reversionary estate in fee, and a particular estate for life or years, may be conveyed by the same deed.

C. W. received from N. P. and his wife, widow of E. W., a lease during her life, of all the estate set off to her as dower, from the estate of E.

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W., which consisted of certain buildings, and 37 acres of land. The estate of E. W. had been assigned to E. W. the younger, who had deceased, leaving the said C. W. and five other children; and the reversion of said buildings had been assigned, by a committee, to C. W. and of the 37 acres, to the said other five children. C. W. executed a deed to to J. W. conveying all his right, title, &c. in the buildings and land on which they stood, as "described by the doings of the committee on record," and also, "one other piece set off by said committee of *the reversion* of the widow of E. W.;" and it was proved that the land assigned as *dower* to said widow, had been known in the family, and acquired the name of the *reversion*, and was so denominated in the partition among the heirs of E. W. the younger. *Held*—That "the *reversion*," must be taken to mean the *dower*, of said widow, and, therefore, that the conveyance to J. W. embraced the leasehold interest of C. W. in the 37 acres, so as to hold J. W. for the payment of rent thereon, as assignee of C. W.

THIS was an action of covenant broken, for non-payment of rent, in which the plaintiff declared, that on the 13th of February, 1833, he, with his wife, Rebecca Pingrey, executed to Charles W. Watkins, his heirs and assigns, for and during the natural life of said Rebecca, a lease of "all 'that certain part of the real estate of Elias Watkins, senior, 'late of Chester, deceased, that was set off to said Rebecca, 'as widow of the deceased, as her thirds, lying and being 'in Chester aforesaid, together with the buildings thereon, 'as set to her by a committee appointed for that purpose," &c.; that said C. W. Watkins, for himself, his heirs and assigns, covenanted, in said lease, to pay the said Pingrey and wife, as rent for said premises, the sum of $42.50 per annum, on the first day of April annually; that said C. W. Watkins entered into possession of the premises under said lease, and that on the 8th of February, 1840, "all the es-'tate, right, title, interest, term, then to come and unexpired, '&c. of, in and to the said demised premises, with the ap-'purtenances, by assignment thereof, then and there legally 'made, came to, and vested in, the said Joel G. Watkins;" that the defendant entered upon the possession of the premises, under said assignment, and continued thereof possessed, until the decease of said Rebecca, on the 5th of July, 1840, and that the defendant had not paid the rent due for said premises on the 1st of April, 1840.

The defendant pleaded that the right, title, &c. of the said C. W. Watkins did not come to, and vest in, him by

assignment as alleged, and that he had not been possessed thereof. Issue joined to the country.

The plaintiff read in evidence an assignment of dower to the said Rebecca in the estate of the said Elias Watkins, senior, made in April, 1814, by which it appeared that said dower consisted of 37 acres and 72 rods of land, and also certain parts of the dwelling house, and barn, and other outbuildings of the estate of which said Elias died seized.

The plaintiff also read in evidence an assignment of the remainder of said estate to Elias Watkins, the younger; and, also, the partition of the estate of said Elias, the younger, deceased, in April, 1827, among his six children—among whom were the said Charles W. Watkins and Joel G. Watkins—by which it appeared that the house and other buildings, mentioned in the assignment of dower to the said Rebecca, were on the land assigned to the said Charles W.

It appeared that, in the partition of the estate of Elias Watkins, the younger, among his children, the reversion of said Rebecca's dower was divided into six parts, one of which consisted of her right in said buildings, and was assigned to the said Charles W.; and that the 37 acres and 72 rods of land constituted the other five parts, and were divided among the other five children of the said Elias.

It also appeared that the use of said Rebecca's part of said buildings was worth as much, per annum, as the use of the land constituting the rest of her dower.

The plaintiff also read in evidence the lease of plaintiff and wife to C. W. Watkins, of the premises in question, and also the deed of assignment of said Charles W., to the defendant, of the tenor following:—

"Know all men by these presents, that I, Charles W. "Watkins, of, &c., for, and in consideration of the sum of '$365 to me in hand paid by Joel G. Watkins of, &c., have 'remised, released, and by these presents, for me and my 'heirs, do remise, release, and forever quit claim, unto the 'said Joel G. Watkins, his heirs and assigns, forever, all the 'right, title, interest, property estate and demand, which I, 'the said Charles W., have in and to certain tracts, pieces 'and parcels of land, lying and being in Chester aforesaid, 'described as follows, to wit,—all that certain piece of land 'set to me as my share of the home farm of my late father

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'Elias Watkins, deceased, as the same is described by the 'doings of the committee on record, in Chester land records, 'having reference to the said records, for the bounds thereof. '*Also, one other piece, set off by said committee, of the re-* '*version of the widow Rebecca Howe, late widow of Elias* '*Watkins, the elder, deceased, having reference to the records* '*aforesaid, for the particular bounds thereof.* Also, all my 'right, title or share of the reversion of the thirds set off to 'the widow Sally Watkins, of the estate of my said father," &c. "To have and to hold the said premises with all the 'privileges and appurtenances," &c.

There was no proof that the defendant had ever claimed or possessed, any of what was the said Rebecca's dower, until after her decease.

The plaintiff also gave evidence tending to prove, that the land so assigned to said Rebecca, as dower, was known in the family, and had acquired the name of "the reversion," and was so denominated in said partition among the heirs of Elias Watkins, the younger.

Upon this testimony the plaintiff insisted, that the right, title, &c., of the said Charles W. came to the defendant by assignment, and that he, the plaintiff, was entitled to recover, either in whole or in part. But the court instructed the jury that, upon the plaintiff's testimony, it did not appear that the defendant was the assignee of the said Charles W., and that the plaintiff was not entitled to recover, in whole or in part, on his declaration; to which the plaintiff excepted.

R. Washburn, for plaintiff.

The leading question in this case is whether Charles W. Watkins did, by the deed of the 8th of February, 1840, assign to Joel G. Watkins the estate which he held in the dower of the said Rebecca, by virtue of said lease. The plaintiff insists that he did. By that deed he remised, released, &c. to Joel G. Watkins, his heirs, &c. all the right, title, &c. which he had in and to all the land set to him as his share of the home farm of his late father, Elias Watkins, deceased, &c. This is the land on which are the house and buildings mentioned in the assignment of dower to the said Rebecca, and the only land set off to Charles W. in the division of his father's estate; and the case finds that the said

house and buildings were on the land set off to the said Charles in said division.

The second piece of land contained in the deed is described as follows, to wit: "Also one other piece set off by said committee of the reversion of the widow Rebecca Howe, late widow of Elias Watkins, the elder, deceased, having reference to the records aforesaid, for the particular bounds thereof."

This, the plaintiff insists, is the 37 acres and 72 rods of land assigned to the said Rebecca, as part of her dower, and included in the lease to Charles W.; and the word "reversion" is used to designate the piece of land, and not any reversionary interest in it; for the case shows that the plaintiff gave evidence tending to prove, that the 37 acres and 72 rods of land, so assigned to the said Rebecca, was known in the family, and had acquired the name of the "Reversion," and was so called in said partition; and the case also finds, that the reversionary interest in the said 37 acres and 72 rods of land was set off to the other five children of Elias Watkins, the younger, and that Charles W. had no interest in it, except what he held by virtue of the lease.

The description of this land commences with "*one other piece.*" This cannot mean the piece of land on which the buildings are, for the case shows that the buildings were on the first described piece set off to Charles W. It continues—"*Set off by said committee.*" It does not say, set off by said committee to Charles W. Watkins, as in the description of the first described piece. The 37 acres and 72 rods of land of the said Rebecca's dower was "set off by said committee" to the other five children. Then follows—"*Of the reversion of the Widow Rebecca Howe, the late widow of Elias Watkins, the elder, deceased.*" After describing the first mentioned piece, this expression could apply to no other than the piece of 37 acres and 72 rods. The said Charles W., also, conveyed all his undivided share of the reversion of the thirds, set off to his mother, the Widow Sally Watkins.

These three pieces are the only parcels of land in which the case shows that Charles W. had any interest; and he conveyed, by said deed, all his right, title, &c. in these pieces, which necessarily includes the interest and estate

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which he held in the two first mentioned pieces by virtue of the lease.

But the case states, that there was no proof that the defendant had ever claimed or possessed any of what was the said Rebecca's dower, until after her decease. It does not, however, state that there was positive proof that he did not; neither does the case show that he claimed or possessed *any part* of the premises contained in the deed, till after the death of said Rebecca, except by causing the deed to be recorded in the land records of Chester, the day it was executed, which gave him the possession, in law, of the whole premises contained in the deed. The covenant to pay rent runs with the land; and the assignee is liable for any breach of it that happens after the assignment, though he have not taken possession of the premises. 1 Saund. R. 241, n. 6; 1 Chit. Pl. 35, 36; 2 Saund. Pl. & Ev. 628; *Williams* v. *Bosanquet*, 5 Eng. C. L. R. 72.

I. The plaintiff contends, that the court erred in instructing the jury, "that, upon the plaintiff's testimony, it did not appear that the defendant was assignee of said Charles W., and the plaintiff was not entitled to recover." Whether the defendant was assignee of Charles W., and entitled to recover, was a question partly of law, and partly of fact; and the court, after instructing the jury relative to the law, ought to have left the facts wholly to the jury. But the court charged that the plaintiff was not entitled to recover—which was erroneous, if the plaintiff's testimony tended to prove that the defendant was the assignee of the said Charles. *Rogers* v. *Judd & Harris*, 6 Vt. R. 191; *St. Albans Steam Boat Co.* v. *Wilkins*, 8 Vt. R. 54.

II. The plaintiff insists, that the case shows, incontrovertibly, that the defendant was assignee of Charles W. in respect to that part of the buildings contained in the lease to him; and that the present use of that part of said buildings was worth as much, per annum, as the use of the land contained in the lease. The plaintiff, therefore, contends that he was entitled to recover, *pro tanto*, even if he was not entitled to recover for the whole; and that the court erred in charging the jury, "that the plaintiff was not entitled to recover in whole, or in part." 2 Saund. R. 182, n. 1; 2 Saund. Pl. & Ev. 628; *Stevenson* v. *Lambard*, 2 East, 575.

Kellogg and *Richardson*, for defendant.

I. From the facts in the case, it does not appear that the defendant is assignee of Charles W. Watkins, the plaintiff's lessee.

1. The second clause in the deed only conveys to the defendant the share in the buildings, &c., "set off" to Charles W. Watkins, *from* the widow Rebecca's dower, ("the Reversion,") by the committee appointed by the probate court for the division of the estate of Elias Watkins, the younger, among the heirs; being one-sixth part of the widow's dower; and cannot be presumed to convey the interest of the said Charles W. in the other five parts of the widow's dower.

2. We insist the reversionary interest of Charles W. Watkins in the estate, in the clause above referred to, is only conveyed, and is particularly described by the reference in said clause to the doings of the committee.

3. The acts of the parties, as stated in the bill of exceptions, sustain the construction contended for by the defendant. He never took possession, or claimed any part, of the premises, till after the death of the widow Rebecca.

II. Should the court be of the opinion that part only of the said Charles W.'s leasehold interest was assigned to the defendant, the plaintiff is not entitled to recover in this action. *Hare* v. *Cator*, 2 Cowp. 766; *Fulton* v. *Stuart*, 1 Ohio R. 369; 1 Wheat. Selw., 5th Am. edition, 494, 499, (note 1); *Halford* v. *Hatch*, 1 Doug. 183; *Jaques* v. *Eaton*, 2 do. 454; 1 Hilliard's Abridgment, 126; 2 Saund. Pl. & Ev. 627; 5 Wend. R. 614; 9 Cowen, 88.

The opinion of the court was delivered by

Royce, J. — The case must turn upon the effect, and operation, of the deed from Charles W. Watkins to the defendant. A question is made in the argument, whether that deed operated at all upon the leasehold interest of the grantor. It was a deed of release and quitclaim, in common form, of all the grantor's "right, title, interest, property, estate and demand, in, and to, certain tracts, pieces and parcels of land," &c. And, according to the operation always given to this species of conveyance, in Vermont, every estate and interest which the grantor had in the lands described,

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must be taken to have passed to the defendant under these sweeping and unqualified expressions. But the case finds that the tract first described in the deed, namely, the share set to Charles W. Watkins, in the estate of his late father, included a part of the premises previously assigned in dower to Rebecca Watkins; and that portion of the dower must, therefore, have been embraced in the lease from the plaintiff and his wife to said Charles W. It follows, that so far, at least, the deed to the defendant did operate to pass the leasehold interest of Charles W. Watkins. A reversionary estate in fee, and a particular estate for life, or years, may well be conveyed by the same deed, if the terms of the conveyance are sufficiently comprehensive and appropriate for such a purpose. *Burton* v. *Barclay*, 7 Bing. 745.

Admitting, for the present, that the deed had no farther operation upon the leasehold estate, or did not convey the whole of it, it still operated as an assignment, *pro tanto*, and would regularly subject the defendant, for rent subsequently falling due. It has, indeed, been truly said, that the liability of the assignee, to the obligations created by the original lease, results from privity of estate, and not alone from privity of contract, like the obligations of the immediate parties to the lease; and that if the assignee acquires but a part of the premises demised, the privity of estate between him and the lessor is limited accordingly. But to admit, as a conclusion from this, that he is not liable in debt, or covenant, for rent becoming payable whilst he holds under the assignment, would be to enable the tenant greatly to abridge the remedies of his lessor, by assigning the premises in parcels to different persons. There may be a doubt, (which we have not found it necessary, in this case, to solve) whether the whole rent may be declared for against such an assignee, leaving him at liberty to defend in reference to his part of the premises, or to plead in abatement the non-joinder of other persons liable, according to the intimations in 1 Saund. R. 519, note; 5 B. & C. 482; 2 Chit. Pl. 552, note; Saund. Pl. &. Ev. 623, 625; or whether a part only should be demanded, on the principle of apportionment. It is familiar law, that rent may be apportioned, though this is generally spoken of as the result of some act on the part of the lessor, or of a stranger. It happens when the lessor grants the re-

version of part of the land, out of which the rent issues, or grants part of the rent to one person, and part to another. So when a stranger evicts the tenant from a part of the land by paramount title. 5 B. & A. 876; 3 Kent's Com. 469; 2 East. R. 576; 2 Wend. R. 561; 1 Sw. Dig. 574. In the cases first put, the tenant comes to have two landlords instead of one. This results from the nature of covenants running with the land, or covenants annexed to the tenure, as they are sometimes called. They attend, and follow, the estate, as accessories or incidents to it; and if that becomes divided, or apportioned, the covenants become so likewise. Covenants of this kind, on the part of the lessor, equally pass to the assignee of the lessee. And it is advanced as clear law, by Hammond on Parties, 120, that such an assignee of part of the premises leased, is entitled to his suit on the lessor's covenants, upon the like principle of apportionment. The author pertinently asks — "what reason exists for distinguishing between him and the lord's assign?" Though I have found it no where expressly laid down, that apportionment of rent can be brought about by the act of the lessee, or those claiming under him, yet such a consequence would seem to flow from the nature of these annexed covenants, as also to be implied in the reasoning of court and counsel in several of the cases, especially in *Hare* v. *Cator*, 2 Cowp. 766. It might be added, that justice to the assignee would appear to suggest a rule, which should measure the extent of his liability, by that of his privity of estate. From all this, I conclude, that the landlord *may* declare against such an assignee, (without undertaking to say whether he *must*) for a share of the rent, proportioned to the relative value of the part which he holds by assignment.

The next objection proceeds upon the same construction of the deed to the defendant, by supposing it not to convey the whole of the leasehold estate. Upon such a construction of the deed, the averment in the declaration, that all the estate, &c., came to the defendant by assignment, is not literally satisfied by the proof. And this is urged as a fatal variance. The allegation should, doubtless, be understood to mean, not only an assignment of the whole estate *in quantity of interest*, but of that estate *in all the land*. Most of the cases upon the effect of such an allegation, have related to the for-

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mer sense in which it is here used. And it is well settled that the lessee's whole estate and interest, *in the premises assigned*, must pass to the assignee. Without this there can be no legal assignment, but at most, an under-lease, or a conveyance in the nature of one. On this distinction the cases of *Halford* v. *Hatch*, 1 Doug. 183, and *Eaton* v. *Jaques*, 2 Doug. 455, were decided. It was even held in the latter case that, though the whole legal interest did pass to the assignee, yet if it was defeasible, as by way of mortgage, it was not such an assignment as would subject the assignee for rent, unless he had taken possession before the rent claimed had become payable. But subsequent cases have applied the language of Ld. Mansfield, in *Walker* v. *Reeves*, 2 Doug. 461, note, that — "By the assignment the title and possessory right passed, and the assignee became possessed in law; and the doctrine of *Eaton* v. *Jaques* has, accordingly, been overruled. *Williams* v. *Bassanquet*, 1 B. & B. 238; *Burton* v. *Barclay*, before cited; *Haig* v. *Harmon*, 4 Bligh. 380. It is only as to the effect of the allegation in the latter sense above stated, that the present question arises. There are grounds for requiring exact proof of the allegation in the former sense, which do not apply here. When an assignment is alleged, that term is understood in its legal acceptation, which, as I have already shown, imports a conveyance of the whole estate in the premises assigned, but does not require a conveyance or assignment of all the leasehold premises. Neither are the covenants transmitted with the land, unless the same estate is assigned to which they were annexed. But an assignment of all the premises is not required for this purpose, because the covenants, like other accessories, "will shape and conform themselves to the accidents of their principal." Ham. P. 119. The question, then, is, whether the allegation, so far as it imports an assignment of all the premises, should be regarded as matter of description, and, therefore, to be strictly proved as laid, or like other allegations of number or quantity, which usually do not require proof to the full extent alleged. Here, again, the authorities are conflicting. In one of the cases, at least, to which we have been referred, (and I have not consulted all the others,) the allegation, the plea, and the issue tried, were the same as in this case; and it appeared that one tract, contained in the

lease, was omitted in the assignment. This was held to be a fatal variance. *Hare* v. *Cator*, 2 Cowp. 766. On the the other hand, it has been more recently said, that this general allegation will suffice, though the assignment is of part, only, of the premises leased. 5 B. & C. 482; Chit. Pl. and Saund. Pl. and Ev., as before cited. I should incline to the latter opinion, especially, as the landlord is not presumed to have accurate knowledge of the transfers and assignments made by his tenant. But this point may be passed without further remark, as the case is decided on another ground.

It remains to be determined, whether the deed to the defendant did actually include all the leasehold premises; in other words, all the premises assigned in dower to Rebecca Watkins, one of the lessors. Her dower consisted of certain portions of the buildings and privileges of the mansion-house, and a tract of 37 acres on the west side of the farm. The reversion of this dower was, afterwards, divided into six parts, in the division of the farm, upon the death of Elias Watkins, the younger. Charles W. Watkins, the plaintiff's lessee, took it in the buildings, where his portion of his father's estate was located, and his five brothers and sisters took it in the 37 acres; which, for that purpose, was divided into five distinct parts or lots. The deed in question is to be construed with a due reference to this condition of things. It professes to convey the share set to the grantor in the division of his father's estate, referring to the report of the committee of division, on record, for bounds, &c., — his share in the reversion of the land, of which his father's widow was endowed, — and "one other piece, set off by said 'committee, of the reversion of the widow Rebecca Howe, 'late widow of Elias Watkins, the elder, deceased, having 'reference to the records aforesaid, for the particular bounds 'thereof." Now it does not appear that Charles W. Watkins had any interest in either of the lots, into which the 37 acres was divided, except his leasehold estate, which extended through the whole of it. Hence, the deed is apparently inapplicable to anything but the entire 37 acres, which was truly "of the dower of Rebecca Watkins," not being the whole of it. And though the word "reversion" is used, instead of dower, the latter is obviously intended; for the widow had dower but no reversion. If the grantor meant

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one of those lots in the subdivision, which was it? The whole difficulty evidently arises from an improper reference to the committee, as also to the records. "Said committee" would literally refer to the committee who divided the estate of the 2d Elias Watkins; whereas, the committee upon the estate of the elder Watkins must have been intended. The same may be said of "the records aforesaid." This part of the deed must be senseless and inoperative, unless we apply it to the subject matter which the parties apparently had in view, regardless of these accidental repugnances. As said by Ld. Mansfield in one of the cases cited, — "To do justice between men, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties." We think that this part of the deed should have its application to the whole 37 acres. The result is, that the defendant acquired the whole leasehold estate, and the plaintiff was entitled to the whole rent demanded.

The judgment of the county court is, therefore, reversed.

Abel Spafford v. Abel Page.

A book debt may be assigned by mere words, without writing.

If, after such assignment, a creditor of the assignor bring a trustee process, wherein he obtains judgment against the debtor, as trustee, and the assignee have notice of these proceedings, he will not, after that, be permitted to recover the debt by a suit in the name of the assignor, even where he had given notice to the debtor of his claim to the demand, before the service of the trustee process.

Quære.—Whether, at law, the assignee can recover upon the claim, after the debtor has been adjudged trustee by a court of competent jurisdiction, even where he had no notice of the trustee process.

This was an action of book account, appealed from a justice of the peace, in which there was a judgment to account, and reference to an auditor.

The auditor reported that the plaintiff exhibited an account against the defendant, of $15.90, which was conceded, by the defendant, to be the balance due from him to the plaintiff, to balance book accounts between them, at the commencement of the plaintiff's action, on the 9th of Jan-

uary, 1840; that, before the commencement of the action, to wit, on the 4th of said January, Abner Field, Sylvester Burke, and Josiah R. Barnes, commenced their action against the plaintiff, as principal debtor, and the defendant was summoned as his trustee; and that, on the 21st of January, 1840, judgment was rendered against the plaintiff, for $17.30 debt, and $4.18 cost, and the defendant was adjudged trustee of the plaintiff, for the aforesaid sum of $15.90, which the defendant subsequently paid.

The auditor further reported, that it appeared before him, that in the fore part of December, 1839, the plaintiff sold the said account against the defendant, to Henry H. Spafford, to whom he was indebted to an amount exceeding the amount of said account; that, within three days after said sale, the plaintiff delivered a transcript of said account to said Spafford; that Job Spafford was called to witness the sale of the account; that the plaintiff did not, at that time, give, nor had he subsequently given, any written order on the defendant to pay said account to said Henry H. Spafford; that the said Henry H. was to credit the plaintiff the said $15.90, but it did not appear whether it had been credited; that said Henry H. Spafford gave notice to the defendant of the purchase of said account, before the service of said trustee process, though not until the plaintiff and said Henry H. had been informed that said process was in the hands of an officer; and that the defendant in this suit attended the trial of said trustee action and made defence.

It appeared that the present suit was commenced on the 9th day of January, 1840, by the said Henry H. Spafford, for his benefit — the plaintiff, as appeared by his testimony before the auditor, having no interest therein — and that judgment was rendered against the defendant in said suit, and an appeal taken by the defendant, on the 18th of said January, before the rendition of judgment in said trustee process.

The auditor reported in the alternative, submitting to the court the questions whether a sale of a book account by parol is valid, and whether a judgment in favor of a creditor against a debtor is valid, after the commencement of a trustee action against against him.

Upon this report the court rendered a judgment for the

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defendant to recover his costs; to which the plaintiff excepted.

O. P. Chandler, for plaintiff.

The question raised by the exceptions is, whether a book debt can be assigned by parol and be protected in the hands of the assignee, after notice, against a trustee process.

I. It is settled that a chose in action, not negotiable, if in writing, may be assigned by delivery only without a written assignment, and will be protected in the hands of the assignee. *Newell* v. *Adams*, 1 D. Chip. 346; *Strong* v. *Strong*, 2 Aik. 373; *Brown* v. *Marine Bank*, 11 Mass. 153; *Jones* v. *Witter*, 13 do. 304.

II. An assignment of a sum of money due on a judgment, or a balance due on book account, may be assigned in writing, and be protected. *Dix* v. *Cobb*, 4 Mass. 508; *Cummings* v. *Fullam*, 13 Vt. R. 434.

III. This rule is adopted upon the principle that the law will regard the trust, and protect all equitable rights against the trustee process. If there has been an assignment of a book debt, by parol, as between the assignor and assignee, the transfer is sufficient; and if the assignor should collect the avails, he would be accountable, in equity, to the assignee. If so, after notice of such equitable right, the debtor would hold the effects in his hands, as trustee of the assignee—as much as he would in case of the assignment of a note *not* negotiable. The parties all stand in the same relation as if the account had been assigned in writing.

If it be said that the evidence of such transfer is not equally available to the debtor, we answer that the evidence would, perhaps, be different, but in the same degree, and the law recognizes no such distinction. To adopt any other rule would destroy all equitable rights, the foundation of which might rest in parol assignments. *Crocker* v. *Whitney*, 10 Mass. 323; *Patlock* v. *Harris*, 3 D. & E. 180; *Amidown* v. *Wheelock*, 8 Pick. 470; 1 Swift's Dig. 434.

H. Closson, for defendant.

The defendant contends, that, having been adjudged trustee of this plaintiff by a court of competent jurisdiction, and been compelled to pay the full amount of his indebtedness to

the plaintiff, he is not liable to pay it again. The subject-matter has been adjudicated upon by a court of competent jurisdiction, which fixes the rights of the parties as conclusively as though it had passed to, and been settled by, this court. 17 Mass. R. 237; 1 Pick. 394, 435; 18 Mass. R. 459; *Evarts* v. *Gove*, 10 Vt. R. 161; Big. Dig. 464, and New York authorities cited. The first final judgment must fix the rights of the parties upon the whole subject-matter.

But it is denied that this claim has ever been legally assigned by the plaintiff to Harrison Spafford, in such a way, at least, as he can set it up against the trustee process. There was no writing — no credit given by Harrison to the plaintiff — no application of the amount.

It is, by many, supposed that a book account may be assigned by mere parol; but if that doctrine be correct, I have not been able to find it recognized in any decided case. What can be the evidence of the assignment? How can the debtor know of the authority of the pretended assignee to receive it? How can his receipt be a safe discharge? Suppose a witness is called to a sale of a mere charge on book. The witness dies or removes, — where is the safety to the debtor? It is true that Judge Swift, in his Digest, vol. I, page 434, says that bonds, policies of insurance, or book debts, may be assigned, but then adds — "such assignments may be by endorsement in writing, or parol, as on sale and delivery, without writing." The parol and delivery there spoken of, necessarily implies that it contains the written promise to pay. Judge Swift refers to no authority. In 4 Mass. R. 508, a case much like the present is found, in which stress is laid on the fact of a *written* assignment being served by copy on the defendant, both by the counsel who argued it, and the judge who gave the opinion.

The opinion of the court was delivered by

Redfield, J. — The question made in this case, in regard to the validity of an oral assignment of a book debt, to vest, in the assignee, the equitable interest, cannot, I apprehend, admit of doubt. Mr. Justice Story states the general doctrine thus, (and he is sustained by all other writers upon the subject, and by the adjudged cases,) "Any order, writing or act, which makes an appropriation of a fund, amounts to an

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equitable assignment of the fund." "An assignment of a debt may be by parol as well as by deed." Equity Jurisp., vol. 2, p. 311. And if the assignment may be by parol, it is surely not important whether it be by writing, or mere words.

In regard to the other question, it may be said to be a conflict between claimants, whose equities are equal; at least, that is the most favorable view of the case of the present claimant. The title of the other claimant has been established by the adjudication of a justice court, a court of competent jurisdiction, and whose decisions, unappealed from, are as conclusive of the rights of the parties, as those of any other tribunal, whatever may be thought of their authority as *precedents merely*.

The former adjudication, then, is as effectual to quiet the rights of the parties, as will be the adjudication of this court when made. After that judgment, unappealed from, this claimant can no more maintain this action, to compel a second payment of this same debt, than could a second assignee of this same debt, after the first had recovered the debt in this or any other court of competent jurisdiction.

The rights of the present claimant are, at most, equitable rights, and such as have never been at all regarded in this state, until within the last twenty years; and although now recognized by our courts, to the fullest extent, we should not be prepared to sustain these equitable rights to the exclusion of legal rights, if we should thereby find ourselves compelled to violate equal equities. And here, it is obvious, that is what we are asked to do, in order to protect the rights of the claimant. The debtor has once been compelled to pay the debt, by a judgment of a court of competent jurisdiction — all the legal parties being summoned, and all the equitable parties, even the present claimant, notified. If, now, we suffer the present claimant to prevail, we not only reverse the judgment of the justice, between the same parties, which is not before us, but compel the debtor, without his fault, to pay the debt twice. And if twice, I see no reason why he may not be compelled to pay it an indefinite number of times, to successive claimants, who establish a prior title, in point of time.

No such absurdity could be tolerated. The assignee of a

chose in action, by our law, comes in the place of the assignor. After the assignment, he, alone, can control or release the debt. His admissions, and not those of the assignor, are competent evidence; and he, too, is bound by any adjudication upon the claim, in the name of the assignor. And if, after the assignment, the assignor himself should recover the debt, without the fault of the debtor, it would forever conclude all claim from the assignee. So, too, the assignee is bound, even without notice, I apprehend, by a discharge of the debtor under bankrupt and insolvent laws; and, *a fortiori*, by an adjudication making the debtor the garnishee, or trustee, of the creditor, and that upon full notice to the assignee. It is not necessary further to go into a consideration of the reasonableness of so obvious a rule. The claimant, in the present case, like any other *cestui que trust*, is bound by the adjudication in the name of his trustee.

Judgment affirmed.

SOLOMON DOWNER *v.* NATHANIEL SINCLAIR and NATHANIEL SINCLAIR, Jr.

A tender of money or specific articles of property, is not, technically, a payment.

Where one agrees with his judgment debtor to receive from him, in payment, within a specified time, certain articles of his manufacture, and the debtor has the property ready and sets it out at his shop, within the time, for the purpose of payment, it will be a good defence, under a plea in bar, to an action on the judgment.

THIS was an action of debt on judgment. The defendant pleaded two pleas in bar. The first was a plea of payment, which was traversed, and issue joined to the court. In the second plea, the defendant alleged that, after the rendition of the judgment declared on, to wit, on the 1st of January, 1839, in consideration that defendants would make and deliver at the shop of said Nathaniel, jr., winnowing-mills, to the amount, and of the value of, said judgment, one half in the course of the then current winter, and the other half in the course of the winter next following, the plaintiff promised that he would receive the same, in full payment and discharge of said judgment; and that, relying on said

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promise, they did make and deliver said mills, nine in number, at said shop, one half in each of said winters, to the full amount of said judgment—a part of which, viz. six, the plaintiff received, and the remainder he did not call for, though they were ready for him, at said shop. To this plea there was a demurrer.

On trial of the issue to the court, the following facts appeared, to wit: that the plaintiff had a judgment against the defendants, who resided at Woodstock, and took out an execution thereon, and put it into the hands of an officer for collection; that while in his hands the defendants proposed to pay it in winnowing-mills, at ten dollars each, to be made and delivered at said Woodstock, one half in the autumn of 1838, and the other half in the autumn of 1839, to which the plaintiff consented, and agreed so to receive his pay; that in the autumn of 1838, the defendants delivered to the plaintiff, and the plaintiff received three winnowing-mills, and, therefor, made an endorsement of thirty dollars on the execution; that, in the autumn of 1839, the plaintiff received from defendants three other mills, and endorsed the same on the execution; that, in November, 1839, the plaintiff called at the defendants' shop to procure the other mills, but did not find the defendants, and made no demand; that, on the defendants' return to the shop, they were informed that the plaintiff had called; and that they then set apart for the plaintiff, three more mills in their shop, which had there ever after remained. Upon these facts, the court decided that the second plea in bar was insufficient, and that the defendants had not paid the plaintiff the amount of the judgment, as in the first plea alleged, and rendered judgment for the plaintiff, for the balance of the execution, after deducting the six mills by him received; to which the defendants excepted.

T. Hutchinson, for defendants.

When the plaintiff had agreed to receive his pay in winnowing-mills, and the defendants agreed to make and deliver them, and did make and deliver them at the place and within the times agreed on, and the plaintiff received two thirds of them, and the other third have, ever since, been there, where delivered, for him, he has no right to refuse it as payment.

Both parties were bound by the contract. The three mills are the property of the plaintiff, and he has his pay as agreed, though he has not carried them away.

The second plea in bar is sufficient, as a defence. The contract therein set forth expresses a good and valid consideration, and a fulfilment on the part of the defendants, and the plaintiff received two thirds of the amount, and the rest was delivered according to contract. The decision in *Bryant* v. *Gale*, 5 Vt. R. 416, would be full in point to support this second plea, if the contract set up in the plea was under seal; and yet, stress is not laid upon the seal in that case, only as it implies a consideration. In our plea, a good and valid consideration is alleged, and no seal is needed for that purpose. The defendants' promise to make and deliver the mills was a good consideration for the plaintiff's promise to receive them in payment; and the plaintiff's agreeing to receive them was a good consideration for the promise to deliver them—for a failure to perform which plaintiff might have maintained an action.

If it be argued that this judgment was not, by the terms of the contract, to be discharged by the contract itself, without a fulfilment also, on the part of the defendants, just so was the case of *Bryant* v. *Gale*. In both cases alike, the original cause of action was not to be considered discharged, until a fulfilment on the part of the defendant or defendants. In both, alike, the defendants did all on their part to fulfil. In one case the plaintiff received two thirds of his pay. In the other case he refused to receive any part, and yet he was barred.

If it should be argued, that the only remedy of the defendants would be to bring a suit upon the contract, and recover their reasonable damages, we answer, that the damages could be nothing less than the amount of the judgment, and the damage otherwise sustained by the plaintiff's not applying the payment in satisfaction of the judgment. This circuity of action the law does not require, nor even admit. See *Bryant* v. *Gale*, on page 421.

Tracy & Converse, for plaintiff.

Was the evidence in the case, as found by the court, sufficient to sustain the plea of payment? Nothing short of the

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accepting and actually receiving the full number of mills would be a payment of the judgment. The plaintiff was not bound to receive any mills on the judgment; and if he had received none, his agreement to receive them would furnish no defence to an action on the judgment; much less would it have operated as a payment of the judgment, though defendants had made them and set them apart for the plaintiffs. There was no consideration for the promise.

The judgment, as a contract of the highest character, could not be satisfied or merged in a mere *parol contract*. Nothing short of the actual payment of it would satisfy it, or a discharge by an instrument of as high a character. The lower grade of contracts may be *merged* in the higher; but the higher never in the lower. 3 Bac. Ab. tit. Extinguishment, D; Cro. Jac. 649 & 650; 3 East. 251; 2 Johns. 341; 5 do. 70.

The fact that plaintiff received a part of the mills, did not oblige him to receive the whole, especially as he received all that were offered to him, at the several times at which he received any.

This, also, disposes of the second plea in bar. Our positions above being correct, that plea is clearly bad. It constitutes no defence to the action for the balance of the judgment. The plea does not allege the judgment satisfied by the agreement. 2 Johns. 340; 5 do. 70. It is not pleaded by way of accord and satisfaction; and indeed the plea shows a want of satisfaction.

This judgment, if satisfied at all, was satisfied by the agreement to take winnowing-mills, and was just as much satisfied before any mills were paid as after. But such is not the fact, as alleged in the plea.

As a plea of accord, it is decidedly bad. Such a plea must show satisfaction by an actual receipt of the thing stipulated to be delivered. A tender of the same is insufficient. 1 Sw. Dig. 299; 1 Roll. Abr. tit. Account; 5 Co. 79, b; Cro. Eliz. 304; 1 Strange, 573; *Bryant* v. *Gale*, 5 Vt. R. 419.

The opinion of the court was delivered by

Hebard J.—The facts detailed do not amount to a payment. There is a difference between making a payment of

a subsisting debt, and doing that, which, on suit being brought, amounts to a defence. A tender of money is not payment, unless it is received. And the same is true of specific articles. The idea of a payment carries along with it the supposition that the money, or other thing, was delivered by the payor to the payee, and by him received. Controversies have arisen in relation to the construction that should be put upon the act of receiving specific articles—whether they were received in payment of an existing debt, or for some other purpose; but there can be no reason for calling an offer to pay, a payment, when the offer was refused. In this case, the winnowing-mills were not received by the plaintiff *actually* or *constructively*. Nor does it appear that he ever knew that the mills were set apart for him; or even that any had been made. Under this state of facts it would be absurd to call this a payment. This disposes of the first plea.

The second plea in bar presents a different question; and the plea being demurred to, it only becomes necessary to inquire whether there is enough set forth to amount to a defence.

The two important averments in this plea are, that the plaintiff promised, in consideration that the defendants would make and deliver these mills, that he would receive them in full discharge of the judgment; and, the corresponding one, that the defendants, relying upon said promise, did make and deliver them. The inquiry here is not, whether the facts set forth in the plea are true, for the plaintiff by demurring, admits them. Now taking the facts set forth to be true, why should not the plaintiff be bound and concluded by them? The objection is, that there was no consideration for the promise; but this objection is not well founded. One promise is a good consideration for another; but more especially when both parties, as in this case, have acted under the agreement. Not to hold the plaintiff to his promise, in this case, would be to enable him to practice a fraud upon the defendants. They, relying upon his promise, had made the winnowing-mills. Suppose that, instead of being winnowing-mills, the agreement had been, like the case of *Mattison* v. *Wescott*, 13 Vt. 258, for a set of *grave-stones*, worth little, except for the person for whom they were designed; or,

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which would be a still stronger case, but the same in principle, suppose the agreement had been for a set of family portraits, having no value, except for the particular use and design for which they were made, the injustice of the law that would allow him to absolve himself from such an engagement, would be most manifest.

If, as in the case of *Mattison* v. *Wescott*, for such an agreement and promise, an action can be sustained to recover money, there can be no satisfactory reason assigned, why the contract, after being fulfilled, may not be applied agreeably to its terms, in extinguishment of an existing indebtedness.

Judgment of the county court upon the demurrer is reversed, and judgment for the defendants.

CHARLES AIKEN *v.* IVORY RICHARDSON.

An affidavit of a creditor that his debtor is about to *leave* the state, is not sufficient to warrant the issuing of an attachment against the body of the debtor, under the act exempting the body from imprisonment, in actions founded on contracts made after the first day of January, 1839.

A writ of attachment against the body, issued without the required affidavit, is void, and an arrest under it, illegal.

Acquiescence of the debtor, in such arrest, gives the plaintiff no right as against the bail, who may take advantage of the defect, by plea, in an action against him.

SCIRE FACIAS against the defendant, as bail for one Ithiel S. Richardson, on two writs of attachment against him.

The defendant pleaded *nul tiel record*, on which issue was joined, and, on inspection of the record, found for the plaintiff.

The defendant further pleaded, that the original actions were founded on contracts made and entered into after the first day of January, 1839; and that the plaintiff did not, at the time of praying out his writs of attachment, file with the authority, issuing said writs, an affidavit, stating that he had good reason to believe that the said Ithiel S. Richardson was about to abscond from the state, and had secreted about his person, or elsewhere, money or other property. Replication, that the plaintiff did file such affidavit, concluding to the country.

On the trial, the plaintiff offered in evidence an affidavit of the plaintiff, filed with the justice, who issued the writ — of which affidavit, the part relied on by the plaintiff, as sustaining said issue, is as follows: "That in my belief Ithiel 'S. Richardson, now in Chester, in said county of Windsor, 'represented as late resident of Albany, in the state of New 'York, is about to leave this state; and that, from the 'best information I have, I verily believe that he has money 'secreted about his person, and is also possessed of goods, 'wares, and merchandize, as of his own property," &c. To the admission of said affidavit the defendant objected, and the same was rejected by the court. There being no other testimony, the jury, by direction of the court, returned a verdict for the defendant.

After verdict, the plaintiff moved the court to render judgment for him, notwithstanding the verdict, — which motion was overruled.

To the decisions of the court rejecting the said affidavit, and overruling the said motion, the plaintiff excepted.

C. Coolidge, for plaintiff.

1. Upon the question of the admissibility of the affidavit in evidence, it is contended that it is in substantial conformity with the requisitions of the act; and, unless it be held that the very words of the act are to be inserted in the affidavit, it ought to have been admitted.

2. Under the motion for judgment, notwithstanding the verdict, the plaintiff insists that the defendant, who is bail, cannot avail himself of the matter pleaded. The authority issuing the writ may have erred; but the defendant in the original action, only, can complain.

The statute does not declare the arrest void, should the affidavit be false or be irregularly issued. At most, it is only voidable; and that by the party arrested. The bail cannot avoid it and its consequences, otherwise than by surrender of the principal, so long as the latter remains liable to the arrest and to commitment. He can relieve himself only through the principal. *Fletcher* v. *Baxter*, 2 Aik. R. 224; *Wood* v. *Kinsman & Lamb*, 5 Vt. R. 558; *Champion* v. *Noyes*, 2 Mass. R. 483; *Sayward* v. *Conant*, 11 do. 146; *Harrington* v. *Dennie*, 13 do. 93.

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N. Richardson and *J. Collamer*, for defendant.

I. The affidavit was essentially different from that required by the statute, as, "about to *leave* the state" is, in substance, quite different from "about to *abscond* from the state."

II. The plaintiff is not entitled to a judgment, *non obstante veredicto*, because —

1. The plea in bar shows both a legal and equitable defence to the *scire facias* — that the principal was illegally arrested, and, if surrendered in court by the bail, would have been discharged. The issue was not immaterial. Rev. Stat. 187, § 63; *Stearns et al.* v. *Marsh et al.*, 14 Vt. R. 303; Doug. R. 45; 1 Tidd's Prac. 152, new ed. 289; *Robertson* v. *Patterson*, 7 East, 405; *Wood* v. *Mitchell*, 6 T. R. 247; *Merrick* v. *Voucher*, do. 51; *Champion* v. *Noyes*, 2 Mass. R. 483; *Harrington* v. *Dennie*, 13 do. 93; *Van Ness* v. *Fairchild*, 1 Chip. R. 153; *Mattocks* v. *Judson*, 9 Vt. R. 343. This manner of making this defence available is consistent with our practice. It is not cause of abatement. We have no practice like that in England, where, for irregularity in indorsing for bail, there is a rule obtained to show cause for setting aside the bond, and entering nominal bail. Our practice has long been that of Massachusetts — that is, in *scire facias* against bail, to plead in defence, all matter which, in any form of practice in England, would discharge the bond or the bail. No other course, but by plea, can be taken in our justice courts.

The opinion of the court was delivered by

ROYCE, J. — The affidavit offered in evidence by the plaintiff, was correctly excluded. It neither proved the fact put in issue by the plea and replication, nor was it such as the statute expressly required. This is evident, unless it can be maintained that, within the meaning of the recent statute, being about to leave the state, and, to abscond from it, are to be regarded as equivalent or synonymous expressions. But it is clear that the latter expression should be applied in its popular and correct sense, — that which it has uniformly received under other statutes, especially the trustee act of 1797. In the construction of that act, an open and undisguised departure or removal from the state, was never allowed to have

the effect of absconding from it, so as to authorize a resort to the trustee process.

But the plaintiff moved for judgment *non obstante veredicto;* and this leads to a different and more important view of the case. Such a motion is founded solely upon what appears to the court upon the record; as where the cause of action is confessed by the defendant's plea, and a defence, radically defective, is set up. Willes' R. 360; 1 Sw. Dig. 779; 6 Cowen, 225. The record here consisted of the declaration, the pleadings, and the verdict; the pleadings alleging, on the part of the plaintiff, that an affidavit of the requisite description was filed, but the verdict finding the contrary. It then stood, that the writs issued upon contracts made after the first day of January, 1839, without an affidavit, as required by the statute. The first inquiry, then, is, whether the writs, so far as they professed to authorize an arrest of the debtor, were void, or merely voidable. If they were void for that purpose, the arrests made under them may, as against the plaintiff at least, be treated as mere trespasses. And hence, for the purposes of this action, the defendant might well say, that, by endorsing the writs as bail, he acquired no legal control of his supposed principal, nor any legal power to surrender him. And this would furnish an ample defence to the present action. But if they were only irregular and voidable, then, as no measures were taken to avoid them, or to vacate the arrests, the defendant did acquire the usual rights of bail. In support of the latter proposition, the case has been likened to those where the party was entitled to a personal exemption from arrest. But we think the question should rather depend upon the intrinsic validity of the process in this instance. By the 63d section, chapter 28th of the Revised Statutes, the arrest or imprisonment of our own resident citizens, for contracts made after the first day of January, 1839, is, in general terms, prohibited. But this is qualified by a proviso, that a writ founded upon such a contract, may issue, as an attachment, against the body of the debtor, upon the filing of the affidavit there prescribed. There is, then, no longer any general authority in magistrates, or clerks, to issue writs upon such contracts, in the form of a *capias* against the person. The right only exists *sub modo* in a particular class of cases, and

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is then derived from the proviso, in opposition to the enacting clause. It would, therefore, seem to result, that, without a compliance with the proviso, there can be no competent jurisdiction to issue such a writ. In this view of the case it becomes analogous, not only to the case cited in the argument, of *Adkins* v. *Brewer*, 3 Cowen, 206, but to many others, which have proceeded on the ground, that jurisdiction of the process was equally essential, as jurisdiction of the parties, and the subject-matter. In *Morgan* v. *Hughes*, 2 T. R. 225, it was decided that trespass might be maintained against a justice of the peace, who had issued a criminal warrant to apprehend the plaintiff, without a previous complaint on oath. In *Barker* v. *Braham & Norwood*, 3 Wils. R. 368, trespass and false imprisonment was held to lie against the creditor and her attorney, for having prayed out, and caused to be enforced, a writ of execution against an administratrix, as for her own debt, without any suggestion upon the record of a *devastavit*. The case of *Smith* v. *Bauchier et al.*, 2 Str. R. 993, is yet more directly in point. By the local custom, a debtor might be arrested upon mesne process, provided the creditor first made oath, that he *believed* the debtor would not appear to the action, but would run away. In that case, the creditor made oath that he *suspected* the the debtor would not appear, &c. And it was adjudged that the warrant to arrest was void, and that the plaintiff and magistrate were both liable in trespass and false imprisonment. To the same effect is the case of *Grumon* v. *Raymond & Betts*, 1 Conn. R. 40. In accordance with these and similar authorities, we are disposed to regard the arrests of Ithiel S. Richardson as illegal acts, from which the plaintiff can claim no benefit.

There is, however, another ground upon which the defence may be sustained. It will be perceived, upon inspection of the statute, that the proviso before mentioned applies, in terms, only to the original writ, or mesne process; for that alone can properly be styled "a writ *on* a contract, *made* after the first day of January," &c. — which the *plaintiff* is to pray out, and which is to issue as "a writ of *attachment* against the body of the *defendant*." And hence it is only by implication from this and other parts of the statute, that a writ of execution, in any case falling within the 63d sec-

tion, can go against the body. When the original writ has properly issued, as a *capias*, under the proviso to that section, the execution is allowed to follow, in like form. This must have been intended by the legislature; for otherwise, the right to arrest upon the first process would be but a vexatious and useless right.* But if the writ has not so issued, the execution must be governed by the general enactment of the section, since there is, then, no ground for implying an exception. Now if we admit that the acquiescence of the debtor so far validated his arrest upon the plaintiff's writs, as to give to this defendant, for the time being, a rightful custody of his person, and the power to surrender him, it does not follow that the present action should be supported. Courts are at liberty to consider the effect of surrendering the principal; and if they perceive that it could be of no benefit to the creditor, they will not require it, but release the bail. This happens when the surrender cannot legally be followed by further proceedings against the body of the principal. *Trinder* v. *Shirley*, 1 Doug. 45; *Postel* v. *Williams*, 7 J. R. 517; *Kane* v. *Ingraham*, 2 Johns. Ca. 403; *Seaman* v. *Drake*, 1 Caines' R. 9; *Olcott* v. *Lilly*, 4 Johns. R. 407; 1 Johns. Ca. 28; *Laflin* v. *Fowler*, 18 Johns. R. 335; *Dunham* v. *Macomber*, 5 Wend. 113; *Russell* v. *Champion*, 9 Wend. 462; *Champion* v. *Noyes*, 2 Mass. R. 481; *Harrington* v. *Dennie*, 13 do. 93. It is true, that, according to the English and New York practice, the bail have to seek relief in such cases, by motion. But in Massachusetts and this state, any sufficient ground for discharging the bail is considered a proper matter to be pleaded. 2 and 13 Mass. R. above cited; *Van Ness* v. *Fairchild*, 1 D. Chip. 153; *Mattocks* v. *Judson*, 9 Vt. R. 343.

The application of what has been said to the case before the court is sufficiently obvious. We are not to infer, from any thing appearing in the case, that the debtor has ceased to be a resident citizen of this state; nor can his acquies-

* This intention was subsequently expressed. See act of 1843, (Pam. laws, No. 9. p. 8,) in which the word "writ," in the 63 Sec. Ch. 28 Rev. Stat. is declared to extend to, and include, writs of execution. —*Reporter*.

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cence in the unauthorized form and service of the original writs, be held to legalize a mode of enforcing the judgments against him which the statute forbids. The plaintiff could, therefore, have derived no advantage from the surrender of the debtor, since he was not entitled to charge him in execution. Judgment of county court affirmed.

Warren Heald v. Benjamin B. Sargeant.

An officer cannot be made a trespasser, *ab initio*, for an abuse of an authority, unless it be the same authority upon which was the original taking. Hence—

If an officer, in attaching the interest of one tenant in common, in an entire chattel, take possession of the chattel, and hold it, until the issuing of the execution, and then sell the entire property, and thus divest the interest of the other tenant, so as to amount to a conversion of his property in it, he does not, thereby, become a trespasser, *ab initio*.

This was an action of trespass, for taking a bureau, brought by appeal from a justice of the peace.

The defendant pleaded a special plea in bar, alleging that on the 19th of April, 1836, he attached said bureau, by virtue of a writ of attachment against one Samuel Walker, 2d, directed to him as constable of the town of Chester, which bureau was the joint property of the plaintiff and said Samuel Walker, each owning an undivided half thereof; that he returned said writ to the justice of the peace who issued the same, and that a judgment was rendered thereon, against said Walker; that a writ of execution was, thereupon, issued on said judgment, against Walker, and put into the hands of the defendant, as constable as aforesaid; that he safely kept said bureau, and advertised it more than fourteen days, and sold the same at public vendue to the highest bidder, and thereupon duly returned said execution to the justice who issued the same—which, he alleged, was the same supposed trespass in the plaintiff's declaration mentioned.

To this plea the plaintiff replied that, at the time of the taking of said bureau by the defendant, the said Samuel Walker was not the owner of one undivided half, or any portion thereof. Issue to the country. Verdict for defendant.

After verdict, the plaintiff moved for judgment notwith-

standing the verdict, upon the ground that the verdict was rendered upon an immaterial issue; which motion the court overruled.

The plaintiff then moved that the judgment be arrested, on the ground of the insufficiency of the defendant's plea in bar; which motion was also overruled.

To the decisions of the court, overruling the said motions, the plaintiff excepted.

N. Richardson, for plaintiff.

The plaintiff insists that, from the whole record, he is entitled to a judgment.

I. It appears, from the defendant's plea in bar, that the bureau was the property of the plaintiff and Walker, — each owning one undivided half thereof, and that defendant attached the whole upon the writ, as the property of said Walker, and sold the whole upon the execution. The defendant held the plaintiff's interest in the bureau, in his possession, by operation of law. He had a right to take and retain the possession of it, till the sale; but the sale of the plaintiff's interest, was an abuse of his authority, which rendered him a trespasser *ab initio*. 6 Comyn's Dig. 382, (c. 2,) and authorities there cited; *Melvill* v. *Brown*, 15 Mass. R. 82; *Weld* v. *Oliver*, 21 Pick. R. 539; 2 Kent's Com. 350, note a, and authorities there cited; 1 Chitty's Pl. 173; *Reed et al.* v. *Root*, 2. Vt R. 120; *Lamb* v. *Day & Peck*, 8 Vt. R. 407; 3 Stark. Ev. 4th part, 1444, 1445; *Ladd* v. *Hill*, 4 Vt. R. 164.

II. When the plea in bar is bad, in substance, and it appears from the whole record that the party, against whom there has been a verdict, is entitled to a judgment, the court will render a judgment *non obstante veredicto*. Such, we insist, is the present case. Stephens' Pl. 96, 120, 144–5–6–7; 1 Swift's Dig. 779, 780, and authorities there cited; 2 Strang. R. 873.

D. Kellogg, for defendant.

It is evident, from the record in this cause, that the plaintiff proceeded upon the ground that he was sole owner of the bureau, inasmuch as he traversed his tenancy in common with Walker, and claimed, *therefore*, that the defendant was

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a trespasser for the original taking. But the verdict of the jury has settled the fact that the plaintiff was tenant in common with Walker, thereby establishing the defendant's justification for the act of taking.

The plaintiff now asks for judgment, because it appears by the defendant's plea, that he sold the entire chattel, and contends that this made him a trespasser *ab initio*. If it be conceded that such sale did make the officer a trespasser *ab initio*, the plaintiff would not be entitled to a judgment, for it is well settled that wherever the plaintiff relies on showing the abuse of an authority in law, as a distinct trespass, and the original act is justified, by the plea, the plaintiff must reply, or new assign the abuse; otherwise he cannot avail himself of it. *Tayler* v. *Cole*, 3 T. R. 292; Ham. *Ni. Pri.* 127; 2 Tyler's R. 70.

A contrary doctrine would be manifestly unjust. The defendant honestly supposing that the plaintiff is going for the original act, justifies that, by his plea; and the plaintiff, by traversing the plea, admits that it is the original act of which he complains, and the jury find the justification true. Now, to permit the plaintiff to say that it was for another act that he brought his suit, would be a complete surprise upon the defendant, and he would be deprived of making any defence to such new complaint. A variety of defences to it might easily be conceived—such as a sale of the plaintiff's right after attachment, and before sale; the plaintiff's assent to the sale; the defendant's ignorance of the plaintiff's title until after the sale; a mistake of the pleader in drawing his plea, and the like. But, in the second place, it is insisted, that the sale did not make the defendant a trespasser *ab initio*. *Smith* v. *Mills*, 1 Term R. 475. It has never been decided that a sale by a co-tenant, of the entire chattel, held in common, would render him liable to his co-tenant in trespass; and the weight of authority, at this day, is, that trover even would not lie. *Welch* v. *Clark*, 12 Vt. R. 681. This act of the officer did not tend to oppress or aggrieve the plaintiff. Ham. N. P. 59. The plaintiff's title was not affected by the sale. *Petingill* v. *Bartlett*, 1 N. H. R. 87; *Cooper* v. *Chitty*, 1 Burr. R. 22; *Hayden* v. *Hayden*, 1 Salk. R. 392; *Shearick* v. *Huber*, 6 Binney's R.; Yelv. R. 180, note *a*.; *Carter* v. *Simpson*, 7 Johns. R. 535;

1 Chitty's Pl. 92, 196; *Young* v. *Marshall*, 21 C. L. R. 215; 8 Mass. R. 521; 14 do. 500; *Farrant* v. *Thompson*, 3 Starkie R. 130; 2 D. & R. Rep. 1.

The plaintiff had neither the possession nor the right of possession. *Welch* v. *Clark*, 12 Vt. R. 681.

The opinion of the court was delivered by

Redfield, J.—Many questions have been moved by the counsel in the discussion of this case, which we are not prepared to determine. In the case of *Ladd* v. *Hill*, 4 Vt. 164, it would seem to have been determined, that a sale upon execution of the entire chattel, although upon the debt of but one of the tenants in common, did devest the title of the other tenant, and was, in law, a conversion of his interest. Where the taking was on the execution, the sale would, in that view, be such an abuse of the authority, as would make the officer a trespasser *ab initio*. We are now asked to extend the same rule so as to make the taking upon the original writ a trespass. The case of *Melville* v. *Brown*, as understood by the same court in *Weld* v. *Oliver*, 21 Pick. 559, would seem to be an authority to that extent. But the case, as reported, only shows a taking on the same process, on which the sale was made. It does not seem to have been much considered, by court or counsel, and being a mere abstract of the point decided, cannot be much relied upon, as an authority. And it being a well settled point, that the attachment of the whole property, and the whole proceedings, under the first process, were legal and regular, we could not make the officer a *trespasser* for any irregularity in the sale upon the execution, which is a distinct matter. To make an officer a trespasser *ab initio*, he must abuse the *same* authority upon which was the original taking. The entire doctrine of making officers trespassers by relation, for an abuse of authority in law, rests upon not well defined ground, which commends itself to our sense either of reason or justice. It is but a technical rule of law, and one, which it would be almost absurd, and wholly unjustifiable, to extend the length now asked for. The view we have here taken of this point, renders it unnecessary to go further in the case.

Judgment affirmed.

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Onion v. Robinson.

ALFRED ONION *v.* THOMAS ROBINSON.

O. and W. having a claim against R. for money received, to their use, and R. alleging that he had paid it to O., they submitted the matter to arbitrators with authority to award costs and damages, who awarded that R. account to O. for a certain sum, in damages and costs. In a suit on the award in favor of O., it was held that there was no mutuality in the submission between O. and R., and, that neither the rights, nor liabilities, of either, were affected by the award. Held, also, that the submission and award, though legally invalid, might be given in evidence under a declaration setting forth the above facts.

THIS was an action of assumpsit on an award, appealed from a justice of the peace, in which the plaintiff declared that, certain differences having arisen between him and the defendant touching the sum of $50, which he alleged had been paid to the defendant by one Walker to the use of the plaintiff and one Wheeler, which sum the defendant contended he had paid to the plaintiff—the plaintiff and defendant had submitted themselves to the award of certain arbitrators, to be made between them, of and concerning said differences. The declaration thereupon alleged mutual promises to perform the award, and also an award by the arbitrators that the defendant pay to the plaintiff the sum of $64 and costs, in full satisfaction and discharge of said matters in difference—which, it was alleged had not been paid, though demanded.

On the entry of the appeal in the county court, the defendant moved to dismiss the action, for want of jurisdiction in the justice to try the cause. The court overruled the motion and the defendant excepted.

The defendant pleaded the general issue and there was a trial by jury. On the trial, the plaintiff introduced evidence tending to prove, that the defendant had received of Onion and Wheeler, former partners in trade, demands for collection, among which was one against one Walker for about $50, which the defendant had collected, and which it was conceded had not been paid over to Wheeler, but which the defendant insisted he had paid to Onion, who insisted that he had not received it; and that, to settle this matter, Onion and Robinson had made a submission to arbitrators in writing. The plaintiff then offered in evidence the written

submission, and the award of the arbitrators; by the former of which the arbitrators were authorized to "make their decision according to the rules of law and equity and award costs and damages accordingly;" and by the latter of which the arbitrators awarded "that the said Robinson do account to the said Onion for the sum of $64 damages, and costs of said arbitration." To the admission of the submission and award the defendant objected, on the ground that Onion had no power to make the submission. The court admitted the papers in evidence, and the defendant excepted.

After verdict for the plaintiff, the defendant interposed a motion in arrest, for the insufficiency of the declaration, which the court overruled—to which the defendant excepted.

D. Kellogg and *O. Hutchinson*, for the defendant, contended, that the award was not binding, because the submission was not mutual—it being of a subject matter in which Onion & Wheeler were jointly interested. They also contended that, as the award could not bind Wheeler, he not being a party to the submission, therefore there was no valid consideration for the promise which the plaintiff assumed to have been made, on the part of Robinson to perform the award; and that this would be fatal to the plaintiff, on the motion in arrest, although the submission and award were admitted in evidence, since it appeared on the face of the declaration that the plaintiff had no interest, in his individual capacity, in the subject matter of the action. *Warden* v. *Burnham*, 8 Vt. R. 390.

P. T. Washburn, for plaintiff.

The submission and award offered in evidence by the plaintiff, were properly received by the court. Under this point, the only question raised by the exceptions is, whether Onion had power to make the submission.

Onion and Robinson were the *parties in interest*. The partnership having been before dissolved, it made no difference with Wheeler whether he looked to Robinson or to Onion for his moiety of the demand. *His* interest was equally balanced, and the fact that *Onion* and *Robinson* entered into the submission shows conclusively that they so understood it. Wheeler's claim was upon the *money*, and

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the object of the submission was to ascertain in whose hands it was lodged. Had Robinson, in pursuance of the award, paid the amount of the demand to Onion, the claim against him would have been as much discharged as though Wheeler had been party to the submission. In the case of *Peters* v. *Peirce*, 8 Mass. 398, the plaintiff submitted all demands subsisting between himself and one Powers, then late his co-partner in trade, of the one part, and the defendant of the other part. The award was in favor of the copartnership, and payment of the amount awarded was made to the partner not party to the submission. The submission, award, and payment were held good.

But whether Onion had *technically* the power of making the submission or not, the defendant by becoming a party to it and appearing before the arbitrators, has waived all right to raise the question. And so it was held in *Batchelder et al.* v. *Hanson*, 2 Aik. 319; where the plaintiffs, who were *jointly* parties to the submission, had *separate and distinct interests*. Yet, the court say that the submission, being between the *real parties in interest*, was itself a *waiver* of all objections which might have been well raised in the ordinary course of judicial proceedings. It is no objection that plaintiff had, originally, no legal claim. 7 Cowen, 105.

The award was made within the submission, and the action is pursuant to the award. It cannot be objected that the defendant after this judgment, will still be subject to the co-partners, for the payment to the plaintiff, who is a co-partner, would be good.

This was not the submission of the co-partners, nor did the plaintiff attempt to submit for them. It was a submission for himself, and thereby he bound himself to abide the award; and had the award been against him, he must have seen it performed. Had it been that he should pay the defendant, he must have paid him, or released him so much on the partnership claims for money collected, if any, for the defendant could have pleaded the award to an action by the co-partners, therefore he would have been entitled to an action on the award when in his favor.

The declaration shows a good and sufficient cause of action. The statement of the subject matter of the dispute shows that the *real parties in interest* were those who ac-

knowledged themselves as such by becoming parties to the submission.

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The opinion of the court was delivered by

ROYCE, J.—The motion to dismiss has not been urged in this court, and will be treated as having been rightly overruled. And under the modern practice in this state, the submission and award were properly admitted in evidence, without regard to their validity in point of law, since they were, in no respect, inconsistent with the declaration, and tended to support it. If they were legally invalid, it was for reasons apparent upon the face of the declaration. It is contended that the arbitrators should have simply decided the fact, whether Robinson had paid over the fifty dollars to Onion. And if this position were well taken, the award might be objected to as evidence, in reference either to the submission or the declaration. But the award proves to be consistent with both. The submission provided for an award of damages, which could only mean the debt and interest claimed of Robinson; and the declaration alleges the submission in that general manner, which has always been supposed to authorize the reception of an award in evidence, directing money to be paid, or specific acts to be performed. In short, we regard the submission, the award, and the declaration, as being, in all essential particulars, consistent and harmonious.

The questions to be considered arise upon the motion in arrest. And first, in reference to the submission. If Robinson had not paid over the money, as he claimed to have done, he owed it to Onion and Wheeler jointly. And the question arises, whether Onion alone could submit the controversy to arbitration. It is clear that, without authority for that purpose, he could not bind Wheeler, so as to conclude him by the award, if it should find the money paid over by Robinson. And since it does not appear that he *professed* or *undertook* to bind him, we discover nothing secured to Robinson by the contract of submission, as a consideration, or equivalent, for his promise to perform the award. The submission is apparently destitute of mutuality. It is true, that Onion promised to perform the award on his part; but what was that performance to be, judging from

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the submission as alleged? Simply to receive the money if awarded to him. But if Robinson should prove before the arbitrators that he had already paid it over, the submission provided no indemnity for him, but left him liable, as before, to the joint suit of Onion & Wheeler. And if the award might have obviated this difficulty, by directing some discharge or indemnity from Onion to Robinson, it failed to do so, and merely directed payment of the money by Robinson.

2. As to the award. The objection is, that it is neither mutual nor final. To this it is answered, and is doubtless true, in ordinary cases, that where a single claim is submitted, and the arbitrator finds a sum due upon it, an award of payment is sufficiently mutual and final. The reason is, that, in such a case, the award becomes the legal evidence of the debt; so that when the debt is paid, the debtor's obligation and discharge will both rest upon the award. But in the present case, though the award is understood to have found a debt due from Robinson, it was not due to Onion alone, but to him and Wheeler. And though payment of that debt to Onion, in pursuance of the award, would operate to discharge Robinson, yet his discharge would not rest upon the award, but upon the prior and continuing right of Onion, as one of the joint creditors, to receive payment of the debt for himself and Wheeler. Thus it would seem that no protection or benefit, whatever, could result to Robinson from the submission or award. It is not perceived that the rights or liabilities of the parties were affected by either.

The judgment of the county court is therefore reversed, and judgment on the verdict arrested.

OLIVER H. BOOTH *v.* ISAAC TYSON, JR.

Where one party contracts to do a job of work, and another to pay a stipulated price for the same, and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and full performance, not a condition precedent to any right of action, unless it be expressly so stipulated, or is inferrible by strong implication. In such cases, the party performing labor, less than full performance, will recover the stipulated price, deducting any damages sustained by the other party, from the failure to perform the entire contract.

THIS was an action of book account, in which there was a judgment to account, and reference to an auditor.

The auditor reported that, on the hearing before him, the plaintiff exhibited an account against the defendant, for moulding, done in the defendant's furnace, the just amount of which he found to be $123.88; that the defendant exhibited an account against the plaintiff, together with certain credits to plaintiff, the just balance of which, in favor of the defendant, the auditor found to be $81.49; which balance, deducted from the just amount of the plaintiff's account, left a balance of $42.39, which the auditor awarded to the plaintiff, unless the court should be of opinion that the plaintiff ought not to recover the same, upon a consideration of the following facts found by the auditor, to wit: That, previous to the performance of the work charged in the plaintiff's account, he contracted with the defendant to make him fifty stoves, of a pattern called the "Badger stove," according to a memorandum, specifying the price of each piece of said stove—and one hundred and fifty stoves, of a pattern called the "Heywood stove," according to a like memorandum; that the work charged in the plaintiff's account, was done under said contract, and not otherwise; that the plaintiff left the employment of the defendant, without moulding the number of pieces necessary to complete the said contract, and had never completed the same; and that the defendant, from time to time, as he had opportunity, disposed of, and converted to his own use, the said work of the plaintiff, to wit: the mouldings or pieces of work charged in the plaintiff's account, in the same manner as he disposed of his other wares.

The auditor further reported, that testimony was offered before him, for the purpose of proving that the defendant

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had sustained damage and loss, in consequence of the non-fulfilment by the plaintiff, of said contract; but that, on a hearing thereof, he found that the defendant had sustained no damage in the premises.

Upon the coming in of this report, the court rendered judgment for the plaintiff to recover of the defendant, the said sum of $42.39, reported by the auditor; to which the defendant excepted.

R. Washburn, for defendant.

In this case, the plaintiff seeks to recover for work done under a special contract, which he has not performed on his part, but has voluntarily and without any excuse, abandoned. The defendant insists, that the contract was entire; and as the case does not show, that any time was specified in it when the defendant should pay the price agreed upon, the fulfilment of the contract was a condition precedent, to be perfomed by the plaintiff, before he would be entitled to his pay, or any part thereof.

The plaintiff could not sustain an action on the special contract, because he has not performed and fulfilled it on his part, and has no excuse for not fulfilling it; neither can he, after having voluntarily, and without any excuse, abandoned it, recover on an implied contract. But, if he had fulfilled the contract on his part, he might then sustain an action on the special contract, or recover the money, which would then be due, in the present, form of action. *St. Albans Steam-Boat Co.* v. *Wilkins*, 8 Vt. R. 54; *Faxon* v. *Mansfield and his trustee, Holbrook*, 2 Mass. R. 147; *Stark* v. *Parker*, 2 Pick. R. 267; *Ripley* v. *Chipman*, 13 Vt. R. 268; *Countess of Plymouth* v. *Throgmorton*, 1 Salk. 65.

S. Fullam, Jr., for plaintiff, contended that, as the contract was, in effect, by the piece, and was, therefore, capable of being divided and apportioned, and as the defendant received a portion of the pieces and disposed of them, he should pay the plaintiff for what he received. The effect to be given to contracts, he maintained, should be reciprocal between the parties. If the defendant had refused to receive more, the plaintiff could have recovered for what he had furnished, and the damage; and if the plaintiff did not furnish all he agreed to furnish, he should recover for what he did

furnish — unless the defendant return it — deducting the damages, occasioned by his failure.

He cited, Oliver's Law Summary, 46, 48, 49; 1 Chit. Pl. 280–1; Chit. on Con. 273, note (o); *Bragg et al.* v. *Cole*, 6 Moore, 114; *Glazenbrook* v. *Woodrow*, 11 C. L. R. (1 series) 213; *Dyer* v. *Jones*, 8 Vt. R. 205; *Gilman et al.* v. *Hall*, 12 Vt. R. 510; 1 Swift's Digest, 684.

The opinion of the court was delivered by

REDFIELD, J. — In this case, the only question is, whether that portion of the plaintiff's claim, for moulding, upon a contract, to be paid, so much by the piece, (according to which, he has charged,) and to mould, or cast, fifty stoves of one pattern, and one hundred and fifty of the other, the contract being entire, and not performed, can be sustained. The auditor has allowed the account, according to the rule laid down in *Dyer* v. *Jones*, 8 Vt. 205, which deducts damage for the non-fulfillment of the entire contract.

There is no doubt, that, in all contracts, where, by the terms of the contract, either express or implied, entire fulfillment is a condition precedent to any right of action, no recovery, whatever, can be had for part performance. Of this class are all contracts for labor, even where no express stipulation, to that effect, is contained in the contract, if the hiring be for a definite time, and there be no provision for any recovery for part performance. *Steamboat Co.* v. *Wilkins*, 8 Vt. 54; *Ripley* v. *Chipman*, 13 Vt. 268; *Brown* v. *Kimball*, 12 Vt. R. 617.

But, in this state, it has been held, that inevitable accident will excuse the entire performance, even where it is expressly made a condition precedent. *Fenton* v. *Clark*, 11 Vt. R. 557. This, however, is not, and never was, the English law.

The rule, as stated above, is in strict accordance with the early English cases, but it is a rule of some harshness and severity, if not injustice, and in this state has not, as far as I know, been extended to any other class of contracts, except that of persons hired for a definite term; and this, perhaps, partly upon the ground of strict authority, and that such contracts are incapable of apportionment — not being of a uniform nature.

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Forfeitures are always odious, both at law, and in equity. Conditions precedent, are in the nature of forfeitures; and, for many years, the courts, both in this country, and in England, have inclined so to construe contracts, as to avoid them. And, in the state of New-Hampshire, the supreme court, in a very elaborate opinion, have excepted even contracts for hiring for a definite term, from this unacceptable doctrine. *Button* v. *Turner*, *infra*. In this state, too, we have excepted a very extensive class of contracts from its operation, i.e. where the labor is bestowed upon the realty, and was not a hiring for a definite term, but by the piece, as in the present case. This has been done professedly upon the ground that it had become impossible to place the parties *in statu quo*; and, there being no express condition precedent, the court will construe the stipulations, as being independent and apportionable, and thus suffer a recovery for part performance, subject to a deduction for the damages sustained for the non-fulfillment of the entire contract, which could not be done, if entire performance were, strictly, a condition precedent to any right of action; and no such recovery, in such a case, could be had, if the contract contained such an express condition precedent. The construction, in this state, has been extended to the case of clearing land, *Dyer* v. *Jones*; and of building stone wall, *Gilman* v. *Hall*, 11 Vt. 510. See, also, *Button* v. *Turner*, 6 N. H. R. 493.

In England in the case of *Oxendale* v. *Wetherell*, 9 B. & C. 386, the court of king's bench, in a very well considered judgment, have extended the same rule of construction to a case of an entire contract to deliver 200 bushels of wheat, at eight shillings per bushel, and a delivery of 135 bushels and a refusal to deliver the remainder, the price then being ten shillings. That case was decided so late as 1829. Although I am aware the New York supreme court, in *Champlain* v. *Rowley*, expressly overruled this decision, as an authority, still, we think the doctrine of the English case the sounder principle. In *Cutler* v. *Clare*, 5 Car. & P. 337, Ch. J. Tindall at N. P., followed the same rule.

The principle of these cases seems to be, that, although the contract is, in one sense, entire, i.e. full performance on the part of the promissor is of the consideration of the contract, yet, if it contains neither expressly, or by strong im-

plication, a condition of full performance, precedent to any right of claim for pay, and is of a uniform nature, and thus capable of just apportionment, the court will consider the promises independent and apportionable, and suffer a recovery for part performance, subject to the deduction of whatever damages the party, entitled to claim full performance, may have sustained.

This principle will clearly entitle the plaintiff to a judgment on this report, and

The judgment is affirmed.

GILL WHEELOCK *v.* JOHN MOULTON, RUFUS HUTCHINSON, and the WOODSTOCK MANUFACTURING COMPANY.

(In Chancery.)

By the law of this state, corporations can convey lands, tenements, and hereditaments only by deed executed by some agent, thereunto authorized by vote of the corporation.

The shareholders, as such, cannot convey the real estate of the corporation, though they all join in the deed.

The name and seal of the principal must be affixed to a conveyance by an agent; or, in the case of a corporation, what, by statute, is made equivalent, the vote of the corporation giving the power to convey, must be recited.

When words made use of in a conveyance, are contradictory, those more specific and particular will control those which are more general.

In case of apparent contradiction in the terms of a deed, the subsequent conduct of the parties may determine the sense in which they understood it at the time of its execution.

THIS was an appeal from a decree of the court of chancery, in favor of the orator, upon a bill of foreclosure, in which the orator alleged, that the defendants, Moulton & Hutchinson, on the 3rd day of September, 1835, by deed, under their hand and seal, in which they described themselves as "sole proprietors and owners of all the shares of the Woodstock Manufacturing Company," conveyed to the orator "a certain piece of land, lying and being in Woodstock, in the county of Windsor, and state of Vermont, described as follows, viz.: it being two hundred shares, numbers as follows—No. one to two hundred, inclusive, one hundred dollars each share, and being all the shares of

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'said company in the capital stock of the manufacturing 'company established at Woodstock," &c. — to which deed there was a condition of defeasance upon the payment of a note of the same date, for the sum of $14,000, executed by the said Moulton and Hutchinson to the orator; that the consideration for said note was paid to said Moulton and Hutchinson for, and the same went to the use of, the said company; that said company, though incorporated by statute, were not then organized, and had no officers appointed, but owned certain real estate, (described) and claiming that the same was conveyed to the orator by said deed, and praying that said Moulton & Hutchinson, and said manufacturing company might be decreed to pay the amount due on said note, or be foreclosed, &c.

The defendants, Moulton & Hutchinson, did not make answer, and the bill, as to them, was taken as confessed. The manufacturing company answered, alleging an organization of the company and appointment of officers, on the 28th of February, 1835 — the division of the stock into two hundred shares — and a deed from the defendant, Moulton, to the company, of all the land mentioned in the bill, in part payment for shares; admitting the execution of the mortgage mentioned in the bill, but denying that it was intended as a conveyance of any thing more than the said two hundred shares, which, it was admitted, were all the shares in the company stock, and denying that the consideration of the note was received for, or went to the use of, said company.

It was thereupon referred to a master to ascertain the amount due the orator, who reported the sum of $2695.81, which the court decreed should be paid by a certain time, specified, or that, in default thereof, the defendants should be foreclosed, &c.

After argument by *T. Hutchinson* for orator, and *O. P. Chandler* for defendants, the opinion of the court was delivered by

REDFIELD, J. — It is hardly necessary to say, that, if the orators prevail here, it must be, as in all cases, *secundum allegata et probata*. This is a bill of foreclosure, upon the land described, counting upon the deed, as a mortgage of the land, executed by the company. It is neither a bill to

compel the company to assume the payment of the debt, as one contracted by their agents, for their benefit, nor, to compel them to perfect an imperfect conveyance; but merely a common bill of foreclosure, giving, as every pleader should do, the *construction* of the deed upon which the orator bases his claim.

To enable the orator to succeed in the present bill, he must make out, 1st, that the deed is, in legal effect, the proper deed of the corporation; and, 2nd, that it was the intention of the instrument to convey the *land* belonging to the company, instead of the *shares*.

There is a prior question, which has been, to some extent, discussed, but, as it is in no sense decisive of the case, it is not deemed expedient to devote much time to the examination of it. It is the question, how far the debt is the proper debt of the corporation. It would seem to be, in terms, the debt of agents, contracted, no doubt, for the benefit of the company. In this state of the case there is nothing improbable, either in the agents mortgaging their shares in the corporation, or in the corporation mortgaging their land and building as security.

1. Upon the question, how far the deed is, in terms, the deed of the corporation, it seems not a little difficult to argue the affirmative from the contract. The deed is signed by the names of Moulton and Hutchinson, with no addition whatever, and, in the body of the deed, they describe themselves, as "proprietors and owners of all the *shares* of the Woodstock Manufacturing Company." When it is considered that a corporation is a mere abstraction, a mere existence in law, and can act only by its votes, through its agents, and that a power to convey land must be strictly followed, it is in vain to argue, that this deed is, in terms, or in legal effect, the deed of the corporation. It is well settled that, at common law, a corporation could only convey land by its corporate seal. 4 Kent's Com. 457. Real estate must always be conveyed according to the *lex loci*. And by the law of this state, then in force, corporations could only convey their lands and real estate, by the deed of their president, reciting the vote of the corporation authorizing the conveyance. In order to bind the corporation, the deed must be theirs, either expressly or by adoption. Angel &

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Ames, 109, 115, 168. The fact that the signers of this deed owned the whole of the shares, will make no difference, in regard to the necessity of a vote of the corporation, in order to convey the land. The *title* to the land was in the corporation, not in the individual stockholders. The deed of one, or of any number of the stockholders will not affect the *title* of the land. The share owners are not tenants in common of the land. They have no title, whatever, to any of the property of the corporation. It is true that one, who owned all the shares, might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation. This, in the present case, was not attempted. And the deed is what its terms import — that of Moulton and Hutchinson, in their private capacity, as the owners of all the shares in the corporation, for the same reason that any man, who professes to convey the title of land, or other property, does it as the owner of that property.

So strict is the law in regard to the conveyance of land by a power, that had these persons been authorized by the vote of the corporation to convey the land, this deed must have been wholly inoperative. *Wilkes* v. *Berk*, 2 East, 142; *Roberts* v. *Button*, 14 Vt. 195, and cases there cited.

2. Upon the question how far this deed is a conveyance of the land, a majority of the court have the same difficulty in coming to an affirmative conclusion. There is no principle of construction better settled, or which more commends itself to good sense, than that general words in a contract will be explained and controlled by more particular and specific words, in the same instrument, and regarding the same subject matter. And the only ground upon which it has ever been argued here, that the land was conveyed, is the general terms in the deed — "a certain piece of land lying and being in Woodstock, &c. — *described as follows, viz.: it being two hundred shares*, numbers as follows — No. one to two hundred inclusive, one hundred dollars each share," &c. How any one, from the deed alone, should suspect the intention of conveying the land and buildings of the corporation, and not the shares, is past my comprehension. It is true the subject matter of the conveyance is

denominated a "piece of land." This seems to have been a mistake as to the law, in the conveyance, in supposing these shares to be real estate. It is much the same as if one should describe a carding machine as real estate. And, for many years it was doubted how far machinery attached to the realty passed by deed. And to show that this supposition is not altogether far-fetched, we have only, as chief justice Marshall once said, in a similar case, to take the contract, I mean the original deed, "by its four corners, and let it speak for itself." It is a contract of mortgage executed upon a blank, with the name of the company and the blank of the condition, and the word *shares* and *No.* and even the clause which seems to have raised all the doubt — "*piece of land*" — in the blank; so that it seems this corporation, not only procured blanks for the *conveyance* of their shares, which is common, but blanks, in full, were also procured for the very convenient purpose of enabling the owners of shares to mortgage them as occasion might require. And in order that these mortgages should stand the test, these shares, with the word "No." and a blank for the figure, were described, *in print*, as a "piece of land, lying and being in Woodstock, in the county of Windsor," &c. This, to my mind, sufficiently explains how this incongruity in these blank mortgages occurred. The printer was no great lawyer, and well supposed the shares in a corporation, where extensive buildings were then in view, savoried strongly of the realty. This may not be the most dignified mode of explaining the absurdity of such a contradiction, in the terms of this deed, but it is the truth. If this be not the true explanation of the dilemma into which this contract brings us, it must be supposed that the parties, after drawing their contract, procured a portion of it to be put in print, and the remainder to be filled with the pen, which is too absurd to be entertained. Hence, we conclude that, although the printer, or the parties, might not know precisely whether these "shares" were of the realty, the parties to this deed did know whether the grantors intended to convey two hundred *shares* in this corporation, as being the owners of those shares, or, on the contrary, as agents of the corporation, to convey the land and buildings of the corporation. And if, as in other cases, we are to be permitted to infer this inten-

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tion from the language used, the situation of the parties, or their subsequent conduct, there can be no doubt the former was the intention of the deed.

It is sure the shares in the corporation, and this land and buildings, were not identical, even at the date of the deed. The latter had been conveyed for a little more than one half the former, but a few days before. It was, doubtless, at that time expected the value of the shares would greatly increase, while the land and buildings, at most, could not be expected to grow much more valuable; and the buildings, especially, would be subject to many casualties. Hence it was natural to expect that the orator would have preferred the contract as it was taken, and good reason can be assigned why Moulton and Hutchinson would not as readily have acceded to this demand.

The orators, too, after having taken their deed, instead of recording it, where deeds of lands are to be registered, in the office of the town clerk, put it upon record in the office of the clerk of the *corporation*, where *transfers* and *mortgages* of *shares*, are required by the by-laws to be recorded, where it remained for about four years, until the shares had become valueless, Moulton and Hutchinson, and the corporation insolvent, and the orator's only resort, to the land and buildings of the corporation, to which, if he could establish a priority of claim, by way of this mortgage, it would be important. The deed is then, for the first time, recorded in the office of the town clerk, and this bill filed.

In this state of the case, a majority of the court think there is no good ground for sustaining the bill against the corporation.

The decree of the chancellor is reversed, and the cause remanded to the court of chancery, with this mandate, that the bill be dismissed, with costs, as to the corporation, and that the orator be suffered to take such a decree, against Moulton and Hutchinson, the other defendants, as may be consistent with the scope and prayer of his bill, and as he may be advised by counsel.

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ELISABETH N. PINNEY, MARTIN PINNEY, HASKELL N. PINNEY and OBED LAMBERTON *v.* WILLIAM FELLOWS and CORNELIUS FELLOWS.

(In Chancery.)

Chancery will uphold a post nuptial agreement between husband and wife, where the claims of creditors will not be prejudiced, the object of which was to create a trust estate for the *separate* use of the wife, by means of a purchase made from the personal earnings of the wife, and property inherited by her during coverture, or loaned to her for such specific object — the husband being unable to provide a support.

When one person purchases lands with his own money, and takes a deed to another, a trust results by operation of law, to the person making the purchase; and the same result follows where a feme covert purchases with the consent of her husband, for her separate use, with means which she was the meritorious cause of acquiring.

Though the deed recites the consideration to have been received from the nominal purchaser, yet the cestui que trust will be allowed to prove, by the trustee himself, that it was her money.

A part payment of the consideration, at the time of the purchase, will charge the land with the trust, *pro tanto*.

The statute of 1797 did not require that the *creation* of a trust in lands should be by writing, but simply that it be manifested and proved by some writing.

The deposition of the trustee, subscribed and sworn to by him, fully proving the trust, was held a sufficient manifestation and proof of it, in writing, in a suit between the cestui que trust and an attaching creditor of the trustee.

The wife being in the open and exclusive use and possession, in conjunction with her husband, of her trust estate, for a series of years, will affect the attaching creditor of the trustee with notice of her trust interest, and place him in no better situation than the trustee himself.

Quære.—Is the attaching creditor, as to the time of notice, to be treated as a purchaser of the estate before levy of his execution?

THIS was an appeal from a decree of the court of chancery, dismissing the orators' bill.

The orators, in their bill, set forth and charged, among other things, that Elizabeth N. Pinney, on the 19th of March, 1824, with the consent of her husband, the said Martin Pinney, purchased of Asa Aikens a certain lot of land in Windsor, and, at that time, and at divers times thereafter, did, with her own proper moneys, and with means procured through the aid of her son, the said Haskell N. Pinney, and by her personal services in taking care of an infirm relative of the said Aikins, pay therefor, the sum of

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$400; that very soon after said purchase, she, with her husband, moved onto said premises, and continued, ever after, to occupy and improve the same, in her own right, until, by reason of her advanced age, and the great infirmities of her husband, she removed with him into the house and family of the said Haskell N. Pinney, who, thereupon, by her permission and request, took possession of the premises, and placed the said Lamberton thereon, as a tenant; that the deed of conveyance of said premises was, by her request, executed by said Aikens to W. H. H. Pinney, another son of the said Elizabeth, who consented to accept the same, and to hold the premises in trust for her, and her heirs and assigns; that on the 15th of October, 1834, the said W. H. H. Pinney, for a nominal consideration, conveyed said premises to Joseph N. Pinney, another son of said Elizabeth, who, on the 22nd of March, 1836, for a like consideration, conveyed the same to the said Haskell N. Pinney; and that both of said last mentioned conveyances were with the express understanding that said premises were, and still continued to be, holden in trust, for the sole use of said Elizabeth, her heirs and assigns.

And the orators further alleged that, soon after the conveyance from said Aikens to said W. H. H. Pinney, the latter went into the state of Indiana, and there had certain dealings with the defendants, resident at Louisville, Kentucky, by reason of which they commenced an action, against him, and obtained a judgment, therein, for the sum of $1674.65; that they, afterwards, commenced an action on said judgment, by writ, returnable to Windsor County Court, and caused the said premises to be attached thereon, as the property of the said W. H. H. Pinney, although they well knew that the same was holden in trust for the said Elizabeth — that the consideration in the purchase thereof, had wholly passed from her, and that said W. H. H. Pinney had no equitable title thereto; and that they obtained a judgment in said suit, and took out execution thereon, and caused the same to be levied on said premises, on the 24th of June, 1836.

The orators further charged, that the defendants had commenced an action of ejectment for said premises, against the said Haskell N. Pinney and Obed Lamberton, and threatened to prosecute the same to judgment, — and prayed that

the defendants might be enjoined from the further prosecution thereof, and from commencing any other action for the recovery of said premises.

The defendants, in their joint and several answer, admitted that they obtained a judgment, in Indiana, against the said W. H. H. Pinney — that they instituted a suit thereon in Vermont — prosecuted the same to final judgment, and levied execution thereof on the the premises in question, and subsequently instituted an action of ejectment for the recovery of the same, as charged in the orator's bill; but they denied that, at the time of suing out the writ on said judgment and causing the premises to be attached thereon, they had any knowledge, or had ever heard, that said Elizabeth had any equitable claim thereto; but that having caused the records of deeds, in Windsor, to be examined, and finding the legal title of the premises to be in W. H. H. Pinney, there being no record of any conveyance thereof, from him, and finding no declaration of any trust in favor of the said Elizabeth, they believed that both the legal and equitable title were in him.

The defendants denied that they had any knowledge until the filing of the orator's bill, of the alleged conveyances by W. H. H. Pinney to Joseph N. Pinney, and by him to Haskell N. Pinney; and they also denied that the premises were paid for with the proper means of the said Elizabeth.

The defendants further admitted, in their answer, that, after said premises were attached, in the suit on said judgment, and before the commencement of said action of ejectment, both their agent and attorney in Vermont were informed that said Elizabeth claimed said premises in equity, as a resulting trust, under the deed of said Aikens; and they further admitted that, at the time of the attachment of the premises, the said Martin and Elizabeth Pinney were residing thereon.

The answer was traversed, and testimony taken. Among the witnesses who testified was the said Asa Aikens and W. H. H. Pinney, the latter of whom deposed: that the premises in question were purchased by his mother, the said Elizabeth Pinney — that $100 were paid down, being a sum received by her from a relative in Connecticut — that, as she desired a credit for the balance, she requested the deponent

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to take a conveyance of the premises, and execute his notes for the balance, and a mortgage for security, as required by said Aikens — that the conveyance was, accordingly, made to him, and that the notes for the said balance were paid, in part, by the labor of his mother, in taking care of the father of said Aikens, partly by wood and money furnished by her and her son Haskell Pinney, and partly by an advance from the deponent, which was refunded to him by the said Elizabeth; and that the premises were held by him as a naked trust for the use and benefit of his mother, until the 14th of July, 1834, when he conveyed the same to his brother J. N. Pinney, with an express understanding that they were to be holden by him in like manner; that he never had possession of the premises, nor exercised any control over the same, nor received any rents therefor; and that the taxes had always been paid by his mother.

Besides this manifestation of the trust, in writing, by the trustee, the facts found from the testimony sufficiently appear in the opinion of the court.

E. Edgerton, for orators.

It appears that Elizabeth N. Pinney personally negotiated the purchase and took the title in the name of her son, merely because she could not, on account of her coverture, execute the required security for the payment of a part of the purchase money. To all this the assent of her husband is to be inferred from the fact of his occupancy, with the oratrix, under the purchase, and from his joining in the bill to enforce the trust.

By express understanding between the grantee, named in the deed of conveyance, and the oratrix, the grantee was not to become the owner of the property—was not himself to make the payments for it—did not make them—never was in possession, and never exercised or claimed any ownership or control over the property whatever. On the contrary, the oratrix furnished the purchase money, and she and her husband, and those claiming under them, have been in possession from the date of the conveyance to the present time.

Wm. H.H.Pinney as between himself and the oratrix, held the estate in question, as her trustee. The agreement be-

tween them, was, that he should *so take and hold it*, and that the *purchase money* should be paid from *her property*. This was a contract to which, in equity, she was competent to become a party, either with, or without, the assent of her husband. It had, for its object, the support of herself and her children, which her husband neglected to provide. Nothing more was done than a court of chancery would have ordered, had the husband, at that time, attempted to prevent the arrangement and get the possession of the funds himself, and the oratrix had thereupon applied to chancery for an order upon the subject. The fact that the husband did not object, rendered such application unnecessary. 2 Story's Com. on Equity, p. 596, §1366, 1367, 1368, 1372; p. 606, §1379, 1380; p. 612, §1387; p. 630, §1402 to 1408; p. 637, §1411; p. 641, §1414 & 1415; p. 647, §1421; p. 651, §1424. *Kenney* v. *Udall*, 5 Johns. Ch. R. 473, 477.

The effect of this agreement and the payment of the first hundred dollars by the oratrix, was to make Wm. H. H. Pinney a trustee of the oratrix, *immediately on his taking the title*, with an equitable lien, undoubtedly, upon the estate, to secure him against the payment of his notes and mortgage, which he gave for the balance of the consideration. And when, subsequently, the oratrix caused these notes to be taken up with "her money and means," then the trust became a *naked* one, and all lien in favor of the trustee ceased. 2 Story's Com. on Equity, p. 458, §1212; p. 464, §1218. *Boyd* v. *M'Lean*, 1 Johns. Ch. R. 582.

It is, however, unimportant at what precise point of time the said Wm. H. H. Pinney became trustee. Even if the oratrix, by reason of her coverture, were under such a disability, as has been urged, that her acts in relation to this matter were all void, yet certain it is, Wm. H. H. Pinney has paid nothing towards the estate, and the estate is not, therefore, in equity, his, but belongs to the person whose money has actually been paid for it; and if the money can be traced into the land, the court of chancery will follow it there, and enforce the trust, as one *resulting* from, and upon, the payment of the money. 2 Story's C. on Equity, p. 443, §1201; p. 456, §1210.

The property of the oratrix went to pay for the land;

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property, too, which is not shown ever to have been reduced to the possession of the husband. 2 Story's Com. on Equity, p. 603, §1375.

In chancery, a trust estate is equivalent to the legal ownership; and a purchaser or creditor of the trustee, with notice of the trust, is bound by it. The actual possession of the *cestui que trust* is, of itself, a sufficient notice, and evidence to all the world, of the extent of his right. 1 Cruise's Dig. page 323, §1, 2; 3 Mass. R. 573 to 582, Reading of Judge Trowbridge; *Taylor* v. *Wheeler*, 2 Vernon, 564; 4 Mass. R. 639; 6 Mass. R. 30 & 31; 6 Mass. R. 488–9; 10 ib. 61, 62, 63; 2 Vt. R. 544; 10 Vt. R. 452.

The trust, if not a resulting one, which needs no declaration, has been sufficiently *declared*, and proved *by writing*, &c., and cannot be avoided under our statute of conveyances, page 315, §522 of the Revised Statutes. See Wm. H. H. Pinney's deposition; 1 Cruise's Dig. page 310, §35, 36, 37,38; *Ambrose* v. *Ambrose*, 1 Peere Wms. 321; 5 John. Chan. 12.

C. Marsh, for the defendants.

I. Do the facts charged in the bill, and shown by proofs, make out a trust estate in the oratrix, resulting by implication, or operation of law?

The best definitions of a trust created by implication of law, and which may be proved by parol, is found in the case of *Bottsford* v. *Burr*, 2 Johns. Ch. R. 415, where Ch. J. Kent is made to say: "The resulting trust, not within the 'statute, and which may be shown without writing, is when 'the purchase is made with the proper moneys of the *cestui* '*que trust* and the deed not taken in his name. The trust 'results from the original transaction, at the time it takes 'place, and at no other time, and is founded on the actual 'payment of money, and on no other ground. It cannot be 'mingled or confounded with any subsequent dealings 'whatever."

Lord Hardwick, in *Loyd* v. *Spillet*, 2 Atk. 148, gives much the same definition, though in less explicit terms: "Where an estate is purchased in the name of one person, 'but the money or consideration is given by another, that is, 'the *cestui que trust*,"— and adds: "He is bound down by

'the statute of frauds to construe nothing a resulting trust 'but what are there called trusts by operation of law." Ch. J. Kent adds, in *Bottsford* v. *Burr*: "It is is a questionable 'doctrine in the view of policy, even under this limitation, 'and has been admitted with great caution."

How, then, do the allegations in the bill and the proofs in this case correspond with the definition given?

It cannot be pretended that the payments were made with the proper moneys of the oratrix. The money was, it is true, in her possession when paid over; but "the possession of the wife is the possession of the husband, and so is her property." *Nelthorpe* v. *Anderson*, 1 Salk. 114; Bac. Ab. 481. A portion was paid by the labor and care of the wife, in nursing and boarding; but, "the fruits of the wife's labor belong to the husband, and do not survive to the the wife, but vest in the representative of the husband." *Burkley* v. *Collier*, 1 Salk. 114. See, also, *Parks & Co.* v. *Cushman*, 9 Vt. R. 324.

The money paid, and the care, labor and expense in boarding and nursing, &c., were the property, and in the possession, of the husband. The other payments were made by Haskell N. Pinney, with his own labor, wood, &c. How can a trust result in favor of *one*, while all the property composing the consideration, was thus the property of *others*? No implication of law can arise from such a complication, such a mixture, of facts and interests as is shown in this case.

The bill states — but there is no evidence of it, nor is it admitted in the answer — that this contract of the wife was made with the consent of the husband. But if it were so, the property being the husband's, the estate would result to him and not to the oratrix. It is no answer to this objection that this is a proceeding on the equity side of the court; for courts of equity are as much bound by the statute of frauds as courts of law; and courts of law are as much bound to sustain resulting trusts by parol evidence, as courts of equity.

II. Can the allegations of the bill be sustained by parol evidence without writing — thus contradicting the deed in terms?

If there be any one position in the law that admits of no

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exception, it is, that a deed fairly and understandingly executed, cannot be contradicted by parol evidence. It must, however, be admitted that, in the state of New-York, and, to some extent, in the English courts, in the *solitary instance* of resulting trusts, both in courts of law and equity, parol proof is admitted to contradict the deed. But the doctrine is not, even now, well established, and many authorities are to be found in England, where its correctness is both questioned and overruled — Rob. on Stat. of frauds, 94–99.

The opinion of Chancellor Kent, in *Boyd* v. *McLean*, 1 Johns Ch. R. 582, 586–7 is relied on, in the argument for the orators. The chancellor in this case relies much on the authority of Sugden, Law of Vendors, 415, as having settled the point that parol evidence may be admitted to contradict both the deed, and defendant's answer; but admits that Roberts holds a contrary doctrine.

In the case before him, he has examined all the previous decisions on that point, and regards them as establishing the same point. We have, also, recurred to the same cases, except precedents in chancery and, in no one of them, is the point directly agitated; nor is it stated whether the testimony offered did, or did not, contradict or vary the deed. The position taken is, that, where the money was paid by one person, and the deed taken in the name of another, parol proof might be admitted. It may, perhaps, be implied that the deed acknowledged the consideration to have been received of the grantee; but it is no where stated. The chancellor relies, principally, on the case of *Gascoyne* v. *Thwing* 1 Vernon, 366, as a leading case.

But the court in Massachusetts take a very different view of the decisions in England, to which the chancellor refers. Mr. Justice Parker, in *Northampton Bank* v. *Whiting*, 12 Mass. 104, remarks, that where, in the courts of chancery in England, it has been determined, that if one man purchases land in the name of another, and pays the money, a trust results, which is not affected by the statute, yet it must be always understood to be in cases where the parol evidence is not inconsistent with the deed. And in *Goodwin* v. *Hubbard*, 15 Mass. 216–18, the same judge says, there are some cases that look the other way, especially *Gascoyne* v. *Thwing*; but it is not clear that the question of parol proof

came directly before the court in that case — the object being to shew that there might be a trust without writing; and seems to rely, much, on Roberts, who says, p. 219, "that parol evidence has always been rejected, on the ground of its contradicting the instrument." It will be found that Sugden relies much on the same authorities cited by the chancellor, especially on *Gascoyne* v. *Thwing*, though he cites many others.

We insist that, in a case where a deed is given with the usual formalities, acknowledging the consideration to have been received of the grantee, a claim set up by a third person, as a resulting trust, to be proved by parol, is not within the exception of the statute of frauds. And in this we are sustained by a long course of decisions in Massachusetts. *Stover* v. *Batson*, 8 Mass. R. 431; *Bank of Northampton* v. *Whiting*, 12 Mass. 104; *Goodwin* v. *Hubbard et al.*, 15 Mass. 211. These, it is true, are decisions at law; but courts of law and equity are equally bound by the statute of frauds. Any parol evidence which would, in a court of equity, establish a resulting trust, would make it the duty of a court of law to sustain such trust, in either trespass or ejectment.

The exception in the statute is: "That where any conveyance shall be made, of any lands, by which a trust or confidence shall, or may, arise or result by implication or construction of law," &c. — "in every such case, such trust or confidence shall be of like force and effect as the same would have been, if this statute had not been made." But what was the "force and effect" before the statute of 29 Car. 2, was enacted? It had long been decided that parol proof could not be admitted to contradict, or vary, a deed, or other written instrument.

"By the express words of the statute of frauds, all resulting trusts, and trusts by operation of law, are left on their original grounds. Such constructive trusts, therefore, whenever they spring out of facts, or the equitable relation of the parties to each other, may, by virtue of said exception, be set up by parol evidence; but where the relative obligations and rights of parties are stipulated and adjusted by written instruments, the instruments must still, speak for themselves, by expression or implication, and no extrinsic

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'or collateral proof ought to be received to engraft any addi-'tional trusts upon the deed, by proof of intention, unless 'upon ground of fraud or circumvention." Roberts on Frauds, 9, 12.

The doctrine of resulting trusts, as established by parol proof, has been favored in none of the states except New York; and, there, Chancellor Kent is reported to have said, (*Boyd* v. *McLean*, Johns. Ch. R. 587) "If the question were *res integra*, he should feel strongly inclined against the doctrine of such trusts, and the admission of parol evidence in their support."

We insist that, according to the true construction of the exception in the statute, relied on by the orators, the resulting trust is to be enforced only against the trustee, or one standing in the same relation, as an heir, devisee, or voluntary grantee, and those who had actual notice, and purchased in fraud thereof. And this bill is drawn on that ground, and charges notice, in fact, in the defendants, which is denied by them, and not proved.

It seems impossible that this doctrine of resulting trusts, so variant of our registry system, can so commend itself to the courts that they would adopt it, on any other principle than that of full notice. And it is to be remarked that no adjudged case has carried it farther than to the party himself. The statute says nothing of the trust being binding, with notice even, and implies that the party thereto, only, can be bound.

It cannot be admitted that it was the intention of the legislature that such a secret, unpublished, underhand trust, resting in parol, should descend with the title, through a long chain of vendors and vendees, or *bona fide* attaching creditors and their assigns, until the *cestui que trust* shall choose to assert his claim. And if it cannot extend *ad infinitum*, where shall it stop? Why not with the first innocent purchaser or *bona fide* attaching creditor?

III. Was the possession of the oratrix and her husband, at the time of the attachment, of such a character as to put the defendants upon inquiry, so that they are chargeable with constructive notice?

The legal possession was by the husband, and not by the wife — the claimed *cestui que trust*.

The possession of Martin N. Pinney might well have been taken to be under W. H. H. Pinney, who held the record title, and who was under obligation to support his aged parents, who might be presumed to be occupying the premises under his execution of that obligation.

The opinion of the court was delivered by

Bennett, J. — The object of this bill is the protection of a *trust estate*, of which it is claimed Elizabeth N. Pinney, the wife of Martin Pinney, is possessor; and the important inquiry is, has she established in herself such a trust interest as can, upon the principles of chancery law, be recognized, protected and enforced against these defendants? This case, in principle, is somewhat important; and with the aid of a very full argument, we have endeavored to arrive at a just conclusion.

At law, the legal existence of the wife is suspended, or rather consolidated with the person of her husband, during the marriage; and from this supposed union almost all her disabilities at law follow. The civil law never adopted this fiction; but it permitted the husband and wife to have *separate* estates and interests. So, in courts of equity, the husband and wife are, for many purposes, regarded as distinct persons, capable of distinct and separate interests. But, as her person, at law, by fiction, is merged in that of her husband, she must look to courts of equity for the protection of her separate interests.

It appears from the testimony, that in 1824 the husband of Mrs. Pinney was very intemperate, poor, and destitute of the means of providing a support for himself and family. In this situation, she made a contract with Asa Aikens for the purchase of the premises, the title to which is now in question; and she made it professedly in her own right, and for her separate interest, that she might have a home for herself and children; and declined to have the deed given to her husband on account of his embarrassed situation. It was understood between her and Mr. Aikens, at the time the contract was made, that Mrs. Pinney was to pay for the place out of her own means, a portion of which she expected to inherit from her mother's estate. When Mr. Aikens executed his deed, in March, 1824, by an agreement between

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Mr. Aikens, Mrs. Pinney, and her son, Wm. H. H. Pinney, it was given to the son, in the usual form, for a consideration, as expressed in the deed, of 400 dollars, under a verbal agreement, on the part of the son, that he would hold the premises for the sole and separate use of his mother. Upon the execution of the deed, Mrs. Pinney paid one hundred dollars of the consideration money, and the son gave his notes to Mr. Aikens for the balance and a mortgage on the place to secure them, but with the understanding that his mother would furnish the means to pay the notes. It is evident from the testimony that the $100, paid by Mrs. Pinney, upon taking the deed, was her money, obtained by way of loan from her brother for this express purpose. Mrs. Pinney afterwards paid about one hundred dollars on her son's notes, in boarding and nursing the aged father of Mr. Aikens; and we have no doubt, from the testimony, the balance of the notes were paid by Mrs. P. from time to time, from the moneys obtained from her mother's estate, and from her own personal earnings. The son testifies, expressly, that he never paid anything towards the land, unless it was by way of loan to his mother, and for which he has been paid by her. As the whole testimony shows old Mr. Pinney, during the whole time, to have been exceedingly poor and worthless, there can be no good reason to suppose that he could have furnished any part of the money.

But it is urged in argument, that, notwithstanding such may have been the facts, as to the manner in which Mr. Aikens received his pay for the land, yet, that the moneys and the earnings of the wife before the payment, vested, absolutely, in the husband, and became his property, and, consequently, furnish no ground for creating a trust to the wife. But, in chancery, the husband and wife are distinct persons, and in a limited sense, may contract with each other; and it will always refuse its aid to the husband to obtain the possession of the separate property of the wife, unless it be upon a competent provision for her support. The husband is bound by the principles of the common law to yield the wife a competent support, and this duty is not dependent upon the receipt of property by the husband from the wife; and if, after marriage, he shall, for sufficient reasons, contract with the wife that she may possess and enjoy *separately*,

property bequeathed to, or inherited by her, or such as she may be the *meritorious* cause of acquiring, equity will uphold such post-nuptial agreement, in cases in which the claims of creditors will not be prejudiced by so doing. *Hanning* v. *Style*, 3 Peere Wm's. 334; 1 Fonb. Eq. B. I. Ch. 2, §6, note (n.); 2 Story's Eq. 601. It would seem, that chancery would need no better reason for upholding a post-nuptial agreement, as between husband and wife, (which was intended to give a home to the wife and family,) than the entire worthlessness of the husband, and his neglect to discharge the marital obligations imposed upon him by law.

It is, however, argued, that there is no evidence that this trust estate in the wife was attempted to be created to her separate use, by the appropriation of the moneys of the wife, and the avails of her own earnings, by and with the husband's consent. But we think otherwise. In 1823, the husband and wife, under a contract between the wife and Mr. Aikens to pay rent, and in anticipation of a future purchase, went into possession; and in 1824 the contract of purchase was made. The deed was then made and put upon record. The one hundred dollars was then paid, and subsequently the residue of the consideration. The rent for 1823 was also settled. The husband and wife continued to live on the premises until after the attachments by the defendants, a period of more than thirteen years, without the payment of rent, and without any question of their right; after which they removed to one of their sons, on account of the husband's infirmities, and the inability of the wife longer to have the personal charge of him — the same son then taking charge of the premises. We can hardly conceive it possible, that the old gentleman should not have fully understood the manner in which a home had been provided for himself and family for so great a length of time. He well knew he had made no purchase himself, and that he paid no rent. He must have known his wife was boarding and nursing the father of Judge Aikens, a year or more, for which they were entitled to compensation; and it is highly reasonable to suppose he must have known his wife was in the receipt of moneys from her friends. We can not doubt the husband was fully advised of all that Mrs. Pinney had done in relation to this business. We hear of no dissent or

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dissatisfaction on his part; and, indeed, he joins with her in this bill. We then find, as a fact proved, that all which was done by the wife, was done with the consent of the husband, and designed to create a trust for the separate use of the wife. Though the *legal interests* in the consideration paid might have been in the husband, yet the wife, being the *meritorious* cause, by which the means of payment were provided, and these being appropriated to create the trust estate for the wife, by the husband's consent, though void at law, yet, still, in equity the arrangement should be upheld, if it can consistently be done.

This brings us to the question, whether a valid trust has been created in favor of the wife, and if so, whether it can be enforced against these defendants. It is a familiar principle in equity law, that when one person purchases an estate in lands with his own money and takes the deed in the name of another, a trust results, by operation of law, to the person paying the consideration; and such a trust is expressly excepted from the operation of the statute relative to the conveyance of lands, and of course may be proved by parol. It is said in argument, that, as the deed to the trustee expresses the consideration to have been received by the grantor from the trustee, it is not open to parol evidence to show it otherwise. It is true, that there are authorities which countenance the idea, that if the consideration money is expressed in the deed to have been paid by the person to whom the conveyance is made, and there is nothing in the deed to create a presumption that the purchase money belonged to another, in such case, parol proof should not be received after the death of the nominal purchaser, to prove a resulting trust. But this is not such a case. Wm. H. H. Pinney, the nominal purchaser from Judge Aikens, is still living; and though he is not a party to this bill, yet we have his deposition before us, which fully proves the trust. Though it has been a matter of some controversy whether, after the death of the supposed nominal purchaser, parol proof alone is admissible against the express declaration in the deed, yet, even in that case, I think the better opinion is, that it may. See Sugden on Vendors, 256–260, 10th ed.; 2 Story's Eq. Jurisp. § 1201, note 2; *Lench* v. *Lench*, 10 Ves. 517; *Boyd* v. *McLean*, 1 Johns. Chan. 582; *Gascoyne* v. *Thwing et*

al. 1 Vern. 366; Parol evidence has, in such case, been admitted to show the trust, against the answer of the nominal purchaser. In this the nominal purchaser admits the facts fully, from which the trust is implied; and, in such case, there is no danger from the adoption of such a principle. And I think, the law, in such case, is well settled, that the facts which create the trust may be shown by parol evidence, though it contravene the recitals in the deed. If, then, Mrs. Pinney had, at the time of the purchase, paid the full consideration money, the law, out of that fact, would have raised the trust. Though it has been sometimes questioned, yet it is now well settled, that a part payment of the consideration, at the time of the purchase, will charge the land with a trust *pro tanto*. *Bostford* v. *Burr*, 2 Johns. Ch. R. 410; *Ryal* v. *Ryal*, 1 Atk. 59; *Bartlet* v. *Peckersgill*, 4 East. R. 577, in note; and *Lane* v. *Diton*, Amb. 409. So far, then, as respects the one hundred dollars, a trust resulted to Mrs. Pinney against the nominal purchaser, which is out of the statute of frauds, and is a charge upon the land.

It is an important inquiry, whether a trust is created as to the residue, which fixes itself upon the land, as a valid trust between the parties to this suit. The parties did not rely upon the law of implied or resulting trusts, but there was an express agreement creating the trust. If the trust, attempted to be created, comes within the statute of frauds, it must fall. It cannot, in that event, be supported by parol evidence, however explicit it may be. The statute of 1797, by which the rights of the parties are to be governed, (Slade's Ed. p. 166) declares, "that all declarations and creations of trusts or confidences, of any lands, &c., shall be manifested and proved by some writing," &c., except such as arise by implication of law, or the same shall be utterly void. Our statute, in effect, is a copy of the 7th and 8th sections of the 29th Charles II.; and has been adopted by most of the states. The authorities under the statute of Charles II. are authorities for us. Is the trust, then, in this case, so *proved* and *manifested* as to take the case out of the statute? The statute does not require the trust to be *created* by writing. All that the statute requires is, that it shall be *manifested* and *proved* by writing. This has been the construction of the statute of Charles II. *Forster* v. *Hale*, 3 Ves. 696.

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Randall v. *Morgan*, 12 Ves. 73. So it has been held in New York, under their statute, which is, in effect, a copy of the English statute. *Movan* v. *Hays*, 1 Johns. Ch. 342; *Steere* v. *Steere*, 5 Johns. Ch. 1. The question then arises, is the deposition of the nominal purchaser, drawn up, signed by him, and sworn to, fully admitting the trust, such a manifestation and proof of it in writing as to render the trust valid? In *Ryal* v. *Ryal*, 1 Atk.. 59, it was held that the admission of the trust, in the answer of the trustee, took the case out of the statute, or rather was a sufficient manifestation of the trust in writing. In *Ambrose* v. *Ambrose*, 1 Peere Wm's. 322, the declaration of the trust was not given by the trustee, till after the death of the *cestui que trust*; yet it was held binding upon the widow of the trustee. In *Lane* v. *Diton et al.*, Amb. 409, it was held to be clear law, by Lord Hardwick, that, if the trustee lays out trust money in land, the court will charge the land with it, upon the admission of the trustee. In that case, it appeared from papers in the hand writing of Diton, and signed by him, who had been permitted by the trustee to manage the trust stocks, that they had been sold, and the moneys laid out, from time to time, in the purchase of land. The land was charged with the trust money, without any writing creating the trust. We think, then, that the deposition of the trustee signed and sworn to by him, fully and clearly setting out the terms of the trust, is a sufficient manifestation of it, in writing; and had the bill been against the nominal purchaser, chancery would have enforced the trust against him, upon the answer.

The question then arises, in what light do these defendants stand? Are they in a better situation than the nominal purchaser? Wm. H. H. Pinney, in 1834, had, upon a nominal consideration, conveyed to J. N. Pinney; and in 1836, the latter, upon a like consideration, conveyed to Haskell Pinney; but both deeds were executed without a seal and are unrecorded; and both were given with the consent of Mrs. Pinney, and with the express agreement that the lands should be held upon the same trust as when in the hands of William. The defendants, after the pretended conveyance from Wm. to J. N. Pinney, attached the lands as the property of William, and in June 1836, caused them to be appraised off, on their execution against William; and

the object of their action of ejectment is, by means of this title, to get the possession of this land. Mrs. Pinney and her husband had been in the actual and exclusive possession of the premises, for about thirteen years previous to the attachment, managing them as their own. William H. H. Pinney never was in possession, and had no concern in their management. Though he had the legal title, and a seizin in law, yet, in equity, the *cestui que trust* was seized of the freehold, accompanied with an actual seizin.

It is a general rule, both at law and in equity, that the open and exclusive possession of land is notice to a purchaser of the possessor's title. In *Rublee* v. *Mead*, 2 Vt. R. 546, the rule was applied at law, and effect was given to an unrecorded deed by reason of this principle, against an attaching creditor. There was no attempt, in that case, to prove an actual notice. The case of *Griswold* v. *Smith*, 10 Vt. R. 454, is to the same effect. Possession is there called *constructive* notice. The general rule is, that whatever is sufficient to put the party upon an inquiry is good notice in equity. *Smith* v. *Low*, 1 Atk. 490; *Ferrars* v. *Cherry*, 2 Vern. 384; *Taylor* v. *Hebbert*, 2 Ves. 437; *Daniels* v. *Davison*, 16 Ves. 250; *Allen* v. *Anthony*, 1 Meriv. R. 262; 2 Story's Eq. Jurisp. 389, § 400. In *Plumb* v. *Flint*, 2 Anstr. 438, Lord Chief Baron Eyre says, constructive notice cannot be rebutted; and in *Daniels* v. *Davison*, the Lord Chancellor says, possession *is notice* to a subsequent purchaser of the equitable rights of the tenant. The case of *Pritchard* v. *Brown*, N. H. R. 397, is strongly in point. The *cestui que trust* was in the open and exclusive possession of the land, and it was held this was sufficient to charge the purchaser with notice of his trust estate, and avoid the deed of the trustee. If, in such case, the purchaser does not inquire, it is *crassa negligentia*; and he shall be presumed to be cognizant with the facts. 2 Fonb. Eq. 151, and note *m*.

Though the defendants, in their answer, deny all notice of the equitable claims of Mrs. Pinney, at the time of the attachment, yet this cannot avail them. Her possession is, in effect, notice, *per se*, in equity, of her equitable estate; and the same consequences flow from it as would flow from an actual notice, unless it be as to guilt. *Sheldon* v. *Cox*, Amb. 626. Besides, notice, in point of fact, of her equitable

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claims, at the time the defendants extended their executions on the land, is not denied in the answer. If it was important, it might well be inquired, whether the defendants can claim to stand as purchasers before that date; and if not, as notice is alleged in the bill, and not denied in the answer, it is to be taken that they were purchasers with actual notice.

It is said this is breaking in upon our registry act, and that this is not to be done unless the notice is so clearly proved as to make the act in the second purchaser, fraudulent in fact. But Mrs. Pinney has, in this case, an equitable estate in lands, which is not required to be *created*, in writing, or to appear upon the town records, where conveyances of lands are to be recorded.

So far as her claim can stand upon the ground of a resulting trust, it is expressly excepted out of the statute; and as to the residue of her claim, and, indeed, as to the whole, there has been such a manifestation and proof of the trust, as to render it valid, though not *created* by deed, or in writing. Why, then, should we be called upon to hold that a trust interest, which is not required to be recorded or even *created* in writing, may be defeated by a purchase from the trustee, and that, too, in a case in which the purchaser has implied or constructive notice? See *Pratt* v. *Bank of B.* 10 Vt. R. 293. To give such effect to the registry act, would be, indeed, to call it in to aid in the protection of fraud, rather than in its prevention. In *Rublee* v. *Mead*, 2 Vt. R. the person in possession holding an unrecorded deed, prevailed against an after attaching creditor of his grantor, upon no other evidence of notice but what arose from the possession of the grantee. In *Wright* v. *Bates & Niles*, 13 Vt. 350, the orator had conveyed to Bates, by an absolute deed, which was put on record, but which in fact, was but a security for a loan. Wright continued in possession, as before; and while thus in possession, Bates, for a valuable consideration, conveyed to Niles. Though Bates had a perfect title of record, yet Wright was let in to redeem, even against Niles. An equitable interest in lands was there protected in chancery, against a subsequent purchaser, without notice, though created by means of a parol agreement with the accompanying circumstances of that case.

It has been urged in argument, that, in this case, there

was no such possession as should put the defendants upon inquiry. The fact that Mrs. Pinney and her husband first went into possession under a contract to pay rent to judge Aikens, can have no effect. There is no evidence that there ever was any written lease, much less that there was one upon record. Upon the execution of the deed to the trustee in 1824, the same was put upon record. This was notice of the determination of the tenancy that might have been inferred to have existed between judge Aikens and those in possession, from the occupancy. So far as the possession is to have the effect of notice, it is immaterial whether the possession was in the husband and wife, or technically in the husband alone. The wife had the equitable estate, and was, in equity seized of it in her own right, and the husband was in, under her. Neither was it of any account that the trustee was the son of the *cestui que trust*. This can have no operation upon the rule of law as to the effect of possession, nor excuse subsequent purchasers from enquiry. The chancery doctrine, as to the protection of trusts generally, is, that where a purchaser is bound to make inquiry, and he neglects it, he takes the property, subject to the trust, in the same manner as he would have done if he had had positive notice of the *cestui que trust* interest. I see no reason why the same principle may not well govern this case, notwithstanding our registry act. The possession of Mrs. Pinney and her husband, had been open, exclusive, and continued, for about thirteen years previous to the attachment, and the defendants are chargeable with the consequences of notice of the trust estate. The defendants, then, standing as privies in estate with Wm. H. H. Pinney, affected with notice, must stand or fall with him.

The result is, the decree of the chancellor is reversed, and the cause is remanded to the court of chancery, with instructions to enter up a decree, that the defendants, and each of them, be perpetually enjoined from further prosecuting their action of ejectment, set up in the bill; and that they quit-claim, for themselves and heirs, all right and title to the premises, to the said Elizabeth N. Pinney and her heirs, within six calendar months, from this date, and also pay the oratrix, Elizabeth N. Pinney, her costs in this court, and, also, in the court of chancery, by such time as the chancellor shall fix.

ORANGE COUNTY.

MARCH TERM, 1843.

Present, Hon. CHARLES K. WILLIAMS, *Chief Justice.*
" STEPHEN ROYCE,
" ISAAC F. REDFIELD, } *Assistant Justices.*
" MILO L. BENNETT.

HUTCHINSON & BUCHANNAN *v.* AMOS HOWARD, *principal*, JACOB KENT, Jr., *trustee*, and ELIJAH FARR, *claimant.*

The attorney has a lien upon an award of arbitrators, where a pending suit is referred, to the full extent of all his just claims as attorney in the suit. This lien cannot be defeated by attachment, under the trustee process.

Dictum. It seems well settled that the attorney has a general lien upon all papers in his possession, and all sums equitably due thereon, for any balance due him upon other matters, as well as in the particular suit.

THIS was an action of debt on judgment, against the principal debtor, in which Jacob Kent, Jr., was summoned as trustee, who disclosed, in writing, that a suit having been pending for several terms in Orange county court, in trover, in favor of said Howard, against him, the same was referred, by agreement between them, to arbitrators, who awarded to Howard a certain sum, which was due, in virtue of the award, at the time of the service of the trustee process; that the arbitrators awarded that each party should pay his own cost in said suit; and that after the service on him of the trustee process, the said Elijah Farr claimed of him the amount thus due on the award, in virtue of an alleged lien thereon, for his costs, as the attorney of Howard in said suit.

The said Elijah Farr, thereupon, interposed a claim upon the effects in the hands of the trustee, in virtue of said alleged lien. It was admitted that he was attorney for Howard in the suit and the submission mentioned in the disclosure; that his costs therein, exceeded the amount of the effects in the hands of the trustee; and that the award was in his hands

when the trustee suit was commenced, and had, therefore, remained in his hands.

The issue was joined to the court, who rendered judgment for said claimant, to which decision the plaintiff excepted.

A. Underwood, for plaintiffs.

It appears from the disclosure of Kent, as also from the award of the arbitrators, that, by the award, Howard recovered no costs in the trover suit; and the question is, whether his attorney in that suit has a lien for the costs of the suit upon the award, without notice, so as to defeat the plaintiff's claim.

1. An attorney has no *general*, but only a *special* lien for costs; therefore, for costs in the trover suit, his lien could not attach upon the award. *Stephens* v. *Marstin*, 10 C. L. R. 173; *Walson* v. *Marshell*, 27 do. 419; *Philips* v. *Stagg*, 2 Edw. 108, cited 1 Eq. Dig. 201.

2. It was competent for the parties to settle the trover suit, notwithstanding any lien that might be claimed; and a submission to arbitrators, and their award, is deemed in law a settlement by the parties. *Grover* v. *Cady*, 1 C. L. R. 144; *Nelson* v. *Wilson*, 19 do. 168; *Gitchel* v. *Clark*, 5 Mass.; *Holt* v. *Quimby*, 6 N. H. 79; *Foot* v. *Tucksbury*, 2 Vt. R. 97; 1 N. Y. Dig. 222; *People* v. *New York*, 13 Wend. 649; N. Y. Dig. 229.

3. It is insisted that, if the claimant had a lien, it could not avail, unless notice had been given to the trustee that he relied on it. The court will not protect an attorney's lien, farther than the rights of an assignee. *People* v. *Hardsburgh*, 8 Johns. R. 235; 1 N. Y. Dig. 221; *Grant* v. *Hazzleton*, 2 N. H. R. 541; 6 D. & E. 361; 1 East, 464; *Pindar* v. *Morse*, 3 Caines' R. 165. Had the claimant been assignee of the award, his claim could not have been maintained against the trustee process, without notice of the assignment to the trustee, before service of the process; and the plaintiff insists that notice of the lien would be equally necessary. At the time of service of the plaintiff's writ on the trustee, Howard could have controlled the claim, received pay and discharged the award, and, by service of plaintiff's writ, he acquired Howard's right. The trustee was, then, indebted to Howard. No notice had been given to him or

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Kent of any lien or claim whatever. Hence the plaintiffs insist that Kent should be adjudged trustee.

4. It is submitted that there can be no lien for costs, where none are recovered, and more especially where the subject matter has not been terminated in a judgment, bu has been made the subject of arbitration and award, wherein costs are denied.

Peck and *Farr*, for claimant, argued that the attorney had a lien on the award for his bill; and cited Doug. R. 104; 1 Swift's Dig. 538; *Hughs* v. *Muyn*, 3 T. R. 375; *Mitchel* v. *Oldfield*, 4 do. 123; *Foot et al.* v. *Tewksbury*, 2 Vt. R. 97; *Lake* v. *Ingham*, 3 do. 158; *Heart* v. *Chipman & Bates*, 2 Aik. R. 162; *Read* v. *Dapper*, 6 T. R. 263; *Randall* v. *Fuller*, 6 do. 456; Story's Comm. on Agency, 391–2.

As to notice, they maintained that it was not necessary. The question was not, whether a *bona fide payment* to the creditor by the trustee, without notice, would discharge him, and defeat the lien; but to whom ought the funds *to be* paid. The attorney and the plaintiffs were both, *bona fide* creditors of Howard; but plaintiffs had no special right to this fund, while Farr had in virtue of a *lien*, to which the prosecution of plaintiffs' right must be subject. Farr's claim was first in right, and the suit could not defeat it.

The opinion of the court was delivered by

Redfield, J. — The court is called upon, in the present case, to decide the extent of the attorney's lien, and how far the same is protected against attachment, under the trustee process.

We do not see how the present case differs from that of a judgement by consent of the parties, or on a report of referees, or indeed, from a judgment in the common course of proceedings *in invitum*. Upon a question how far the debtor shall be protected by a *bona fide* payment, without notice of the lien of the attorney, the question whether the costs of the attorney formed a portion of the award, might be important; but we apprehend it is not so here.

The law seems to be well settled, that the attorney has a general lien upon all papers in his hands, and upon the bal-

ances equitably due thereon, not only for his expenses incurred in the particular suit, but for any general balance due him. "This," says Mr. Justice Story, in his treatise on agency, "has long been the settled practice, and is now fully recognized, as an existing general right."

Chancellor Kent, 2 Com. 640, 641, lays down the same rule in the most unequivocal terms — "The client," says he, "cannot get back the papers, without paying what is due, (whatever becomes of the suit,) not only in respect of that business, for which the papers were used, but for other business, done by him, in his professional character." This is now, doubtless, the settled law upon the subject. This lien, in the English chancery and common pleas, extends only to the ultimate balance due from the client in equity, and is not protected against equitable setoffs, as is the case in King's Bench. The rule of the English chancery, is adopted in New-York. *Austin* v. *Bemiss*, 8 Johns. R. 274; *St. John* v. *Diefendor*, 12 Wendell, 261. The same rule has been adopted in this state. *Walker* v. *Sargent*, 14 Vt. 247. The cases cited in argument are of this character, and, indeed, only go the extent of refusing to protect the attorney's *general* lien, against equitable offsets.

It being thus established, that the attorney's lien extends to this award, it is obvious it cannot be defeated, either by an attachment or assignment, either of which could only operate upon the debtor's interest in the same. Notice to the debtor could be of no avail in this case. It is unnecessary, except in case of negociation of a debt, or to protect a *bona fide* payment of the debt, in ignorance of the lien claimed.

Judgment affirmed.

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WILLIAM BLANCHARD *v.* ROBERT MURRAY.

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In the case of a written submission to three, and, in case one of them could not be procured, to a fourth—held that an award made by the four, in pursuance of an agreement of parties, on the day of trial, was good.

In a declaration on an award, it is not necessary to set forth the whole award.

An action of ejectment, and a controversy in relation to the seizin and possession of land, may be submitted to arbitrators.

After a verdict, for plaintiff, in an action upon an award, embracing the fees of the arbitrators, judgment will not be arrested because the declaration does not contain an averment that the plaintiff has paid the arbitrators fees.

ASSUMPSIT on an award, in three counts. In the first count, the plaintiff declared that there had been an action of ejectment commenced by him, against the defendant, to recover the seizin and possession of a certain piece of land; and that, for the settlement and determination thereof, the parties, on or about the 15th of June, 1840, made an agreement in writing to submit the same to the arbitrament and final determination of Enoch Hebard, Araunah Spear, and Avery Fitts, and if either of them could not be obtained, "they would accept Daniel Child"; and the plaintiff averred that "said arbitrators undertook the trust and burden of said 'award, and, on the 22nd day of October, 1840, the said 'arbitrators, Enoch Hebard, Araunah Spear, Avery Fitts, and 'Daniel Child, met at said Brookfield, and at the request, and 'mutual wish, of the parties aforesaid, they, each of them, 'then and there fully heard the plaintiff and defendant, on 'all the matters aforesaid; and thereupon, afterwards, to 'wit, on the 23rd day of October aforesaid, made, published, 'and declared, their award in writing, pursuant to said sub-'mission and agreement, whereupon and whereby the said 'arbitrators ordered and awarded, among other things, that 'defendant do give the plaintiff the seizin and peaceable 'possession of said piece of land aforesaid; and that defen-'dant pay the plaintiff one cent damages and his cost, in and 'about said suit in ejectment, allowed at $15.35, and all the 'cost in and about said arbitration, taxed and allowed at '$9.50, and their fees as arbitrators, taxed at $16.02"—and averring that the defendant had not paid to the plaintiff said sum of money in damages and cost specified in said

award—without an averment that the plaintiff had paid the said fees of the arbitrators.

In the second count, the plaintiff declared simply upon a submission of the said matter in controversy, on the 22nd day of October, 1840, to the award of Enoch Hebard, Araunah Spear, Avery Fitts and Daniel Child, with averments as in the first count, except as to an award of the seizin and possession of the land.

The third count declared on a submission to the award of said arbitrators "to be made and declared on or near the middle of October, 1840."

Plea, the general issue, — trial by jury, and verdict for plaintiff. The defendant moved an arrest of judgment, for the insufficiency of the declaration.

W. Hebard, for defendant.

There are three counts in the declaration; and if one count is bad, and a general verdict is taken, the judgment must be arrested. *Walker* v. *Sargent*, 11 Vt. 327. The first count in the declaration is bad, for the following reasons:

1. It alleges that the submission was made "in writing" on or about the 15th day of June, 1840. The submission being in writing, the declaration should allege the precise day.

2. The declaration alleges that the submission was in writing to three, naming them; and in case either of those individuals could not be obtained, another was named as a substitute; and it further alleges that the award was made by *four* "pursuant to said submission." It alleges a fact that is inconsistent, untrue, and impossible. An award made by *four* could not be pursuant to a submission to *three*. An award must be according to the *submission*.

3. The declaration alleges that "*among other things*" the arbitrators awarded, without stating what *other things* were awarded, or whether the *other things* awarded had been performed.

4. The declaration alleges that the arbitrators awarded, *among other things*, to the plaintiff, "the seizin and peaceable *possession of said piece of land*." In this the arbitrators undertook to do that which they had no power to do.

5. The declaration states that the arbitrators undertook

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the trust and burden of said award on the 22nd of October, and that they made their award on the 23rd of October. The declaration should have alleged also, that, by the terms of the submission, they might award on a different day from that on which they had their hearing.

A further objection which applies to all the counts, is, that the plaintiff claims the arbitrators' fees, without averring that he had paid them. Where arbitrators' fees are awarded to be paid by one of the parties, the other party cannot recover them in an action on the award, without actual payment, and that should be averred. *Platt* v. *Smith*, 14 Johns. R. 368.

J. L. Buck, for plaintiff.

When the plaintiff has a good cause of action, judgment will not be arrested for a defect in the declaration, merely formal. All such defects are cured by verdict. *Vadakin* v. *Soper*, 1 Aik. 287; *Stilson* v. *Toby*, 2 Mass. R. 521; *Spear* v. *Parker*, 1 T. R. 145; *Spencer* v. *Overton*, 1 Day, 183.

The inquiry then is, whether there is enough contained in the declaration, *in substance*, to show that the plaintiff had a good cause of action. The declaration shows that a dispute had arisen between the parties, and that an action was pending in the county court to settle that dispute; that, for the purpose of settling that suit, the parties agreed to submit the matter in controversy to arbitrators, mutually chosen; that they did submit and have a hearing before the same arbitrators, who made and published their award in writing; that the plaintiff has performed every thing required by the award to be performed by him, and that the defendant has neglected to pay the damages and costs awarded against him. The declaration shows a consideration, a promise, and a breach of that promise. 1 Chit. Pl. 259; 1 Saund. Pl. & Ev. 180.

That the award was made and signed by four cannot vitiate it, for, after verdict, it will be presumed that the parties agreed to submit to, and accept, the award of four instead of three.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — It is correctly stated and admitted by

the counsel in this case, that many objections to a declaration, which would be fatal on a general demurrer, as well as those of which the defendant could avail himself on special demurrer, are cured by a verdict. In the present case, it is not necessary to advert to those cases where this principle is acknowledged, as the objections to this declaration would not have been fatal, on general demurrer.

The declaration is assumpsit on a submission to, and award by, arbitrators. The first count sets forth a written submission to three arbitrators, and in case either of them could not be obtained, a fourth was agreed on; that, at the meeting, all four attended, and by agreement of parties, the four heard the case, and, in pursuance of the written submission, and the agreement, made the award declared on. We see nothing irregular or illegal in this proceeding on the part of the arbitrators or parties, which should vitiate their award; and the declaration which counts upon this agreement, does not appear to us to be inconsistent, improbable, or untrue, as averred in the argument. Nor is it necessary, in declaring on an award, to set forth the whole. It is sufficient to set forth that part on which the party relies, and to say that, *among other things*, they made this award. This form appears to be according to established precedents. It is no objection to this award that they awarded to the plaintiff the possession of land. The controversy submitted, was an action of ejectment; and a controversy as to seizin and possession may as well be the subject of arbitration, as any other controversy, whatever doubt may be suggested, as to submitting a question of title to arbitrament. The objections as to setting forth the date of the writing, and, also, as to the time of making the award, have not been relied on in argument.

The second count is upon the same award and submission, with this difference, the submission is not stated to be in writing, but declared on as a submission to four, — and upon that part of the award, only, which relates to the damages and cost, and the arbitrators' fees.

Whether the plaintiff could have recovered on this declaration, for the arbitrators' fees, without an averment that he paid them, or whether he did, in fact, recover for them, are questions which do not arise on the motion in arrest. It is

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certain he could not have recovered without proof that he had paid them. The declaration, however, cannot, after a verdict, be adjudged insufficient for want of this averment. The judgment of the county court is, therefore, affirmed.

BETSEY CARPENTER *v.* EPHRAIM THAYER, JOEL NUTTING, and RUFUS HUTCHINSON.

An assertion, by a joint owner of land, of an exclusive title to the whole, and a contracting to sell the whole, are evidence of an *adverse* possession, and such an ouster as to enable the co-tenant to maintain ejectment.

The supreme court will not revise the action of a county court, upon their own rules.

THIS was an action of ejectment for Lot No. 10, in the 3d division in Braintree. On trial, the plaintiff showed title to one undivided tenth part of said lot, and that the defendants were in possession. The defendants showed that said Hutchinson held, by quit claim deed of the whole lot, from one owning one undivided fifth part of said lot, and that the other defendants were in possession under Hutchinson. The plaintiff gave evidence tending to prove, that one Riford, claiming to be agent for the plaintiff, called on Hutchinson and requested to have the plaintiff let into possession of her share, which Hutchinson refused, claiming to hold the whole lot in severalty as sole owner; that W. Nutting, attorney for the plaintiff, called on the other defendants on the lot, and claimed to have the plaintiff let into possession as tenant in common, which they declined, claiming the whole lot in severalty, under Hutchinson, on a contract for purchase.

Among the plaintiff's testimony was the deposition of A. Putnam, which had been read at the former trial of the cause under a written agreement of the parties, not limiting its use to one trial, but had not been left in the files of the court. To this deposition there was objection, and an offer to prove by the testimony of Hutchinson, that he understood that he agreed only to its admission for one term. The court admitted the deposition.

The defendants requested the court to charge the jury,

that the plaintiff could not recover, without proof that plaintiff's agent had full authority to demand possession; nor unless the demand was in writing. The court refused so to charge; but did charge, that, if the defendants were in possession, claiming the whole lot, in severalty, adverse to all others, sufficient demand was proved; to which decision the defendants excepted.

E. Weston and *L. B. Vilas*, for defendants.

The defendants contend that the county court erred,—

1. In the charge to the jury. The demand to be let in, should have been in writing, and the defendants claiming to own the whole lot in severalty, when inquired of by a stranger to the title, having no written power from the plaintiff, did not dispense with a regular demand to be let in.

2. In admitting the deposition of A. Putnam. An agreement to use an informal paper, extends, only, to the term. From the plaintiff's not leaving the deposition on file, the defendant had a right to presume that it was withdrawn, and would never be used in the case; and the offering of it was as much a surprise as though the defendants had never heard of it.

W. Nutting, for plaintiff.

The defendant excepts to the decision of the county court in admitting the deposition of Putnam, 1st, because it had not been kept in the files of the court during the preceding vacation; and, 2nd, because he had offered to prove, by R. Hutchinson, that he agreed to its admission for one term, only. We have no *law* requiring depositions to be left on file after they have been once used. They are, on common law principles, the property of the party using them, and as much under his control, as his deeds, bonds, notes, or other paper evidence which he uses in support of his action. Our county court has adopted a *rule*, that a deposition, after having been used in a cause, shall be "lodged with the clerk, and remain in his office." But there is a wide difference between a *rule of court, and the law of the land*. The latter is imperative upon our courts, and they must enforce it; while the former is a creature of their own, and subject to their control.

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The second objection to the deposition was, that defendants "offered to prove by Hutchinson" (defendant,) "that he understood he agreed to its admission for one term." To this it need only be replied — 1st. The witness was incompetent; and, 2nd — That his offer was to alter, vary and contravene a written agreement by parol evidence.

The defendant excepts to the charge of the court, "that, if the defendants were in possession, claiming the whole lot in severalty, adverse to all others, sufficient demand was proved. No notice to quit, or demand to be let in, which is the same thing, is necessary, except in those cases where the defendant is, in some sense, tenant to, or holding under, the plaintiff. When, therefore, the defendant acknowledges no tenancy, but claims, and holds, adverse to the plaintiff, he is not entitled to notice. 2. Bl. Com. 247, n. 3; *Clapp, Ad'r* v. *Beardsley*, 1 Vt. R. 151 (p. 168,); *Catlin* v. *Washburn*, 3 Vt. R. 25, (p. 40.)

The opinion of the court was delivered by

ROYCE, J. — It was proved, on trial, that the plaintiff owned but one undivided tenth part of the land sued for, and that the defendants, Thayer and Nutting, were in possession of the whole lot, under the other defendant, Hutchinson. It, also, appeared that Hutchinson had a title to an undivided fifth part of the lot. The plaintiff and Hutchinson were thus shown to be tenants in common; and the other defendants, being in under Hutchinson, and, therefore entitled to stand upon his right, were, also, in effect, tenants in common with the plaintiff, to the extent of Hutchinson's title. Under these circumstances it became necessary for the plaintiff to show, that she had been disseized or ousted by the defendants, before the bringing of this suit; since her only right was to enjoy the premises in common with them. And the principal question in the case arises upon the evidence, received at the trial, to prove such an ouster.

It is contended that what transpired between the defendants and the plaintiff's professed agents, Riford and Wm. Nutting, was not admissible evidence for this purpose, without proof of an express, and even written authority to those two persons, to act for the plaintiff in that behalf. This is assuming that in a case of this kind, an ouster can be proved

by nothing short of an actual denial of possession when demanded, made to the co-tenant, or to some duly authorized agent. But this is a much stronger proposition than the authorities appear to warrant. As co-tenants have a community of interest, the possession and pernancy of profits, by one alone, is usually presumed to be in the right of all. In this respect it differs, greatly, from the unlicensed entry and possession of a stranger. Hence the ancient, and still subsisting, rule of law, that, to entitle one co-tenant to support ejectment against another, an *actual ouster* must be shown. And it was once supposed that this rule could only be satisfied by the strongest evidence, — something little short of an actual turning out by force. But this strictness was, long since, relaxed, and the rule has been applied in a more comprehensive sense. Thus it was said by Willes, J. in *Fisher* v. *Prosser*, 1 Cowp. R. 219, — "However strict the notion of an *actual ouster* may have formerly been, I think adverse possession is, now, evidence of an *actual ouster*." This is the substance of all the modern decisions. An *actual ouster* is still to be made out; but it may, and should be, found, upon satisfactory evidence, of an adverse possession. The hostile character of the possession may be evinced in various ways. It will not be inferred from *exclusive* possession, merely, unless it has been of very long continuance, and attended, as in the case just cited from Cowper, with circumstances excluding all probability of assent or understanding on the part of the other owners. *Catlin* v. *Kidder*, 7 Vt. R. 15. But with this exception, (and even this does not generally hold between the charter-grantees of a township, *Vt. University* v. *Reynolds*, 3 Vt. R. 542,) the evidence is the same as in other cases of adverse possession. *Pomeroy* v. *Mills*, 3 Vt. R. 415; *Higbee* v. *Rice*, 5 Mass. R. 344; *Cummings* v. *Wyman*, 10 Mass. R. 464; *Barnard* v. *Pope*, 14 Mass. R. 434; *Chapman* v. *Gray*, 15 Mass. R. 439; *Brown* v. *Wood*, 17 Mass. R. 68; *Shumway* v. *Holbrook*, 18 Mass. R. 114; *Clark* v. *Vaughan*, 3 Conn. R. 191; *Giddings* v. *Canfield*, 4 Conn. R. 488; *Allyn* v. *Mather*, 9 Conn. R. 128; 14 Vin. Ab. 512. There can be no doubt that the evidence in the present case was sufficient to bring it fully within the doctrine of the authorities here cited. Although the deed to Hutchinson, being but a quit-

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claim of the grantor's right, was not, of itself, evidence of any pretension, on the part of Hutchinson, adverse to the interests of the other co-tenants, (7 Vt. R. as before cited); yet he proceeded to exercise the rights of sole owner. In that character he contracted to sell and convey the whole lot to the other defendants, and asserted an exclusive claim and title to the whole, when applied to by Riford. And the other defendants vindicated themselves under this assumed title of Hutchinson, in repelling the request made to them in behalf of the plaintiff. We have no occasion, then, to inquire as to the precise authority with which Riford and Nutting were invested. For admitting that they acted without authority, the declarations then made were, nevertheless, evidence to characterize the possession, which, upon all the showing, was unequivocally adverse to the plaintiff's right. The exception taken to the charge of the judge is, therefore, unsupported.

Little need be said in reference to the other exception. If the deposition of Putnam was withdrawn from the files in violation of any rule of the county court, that rule is not brought before us; nor are we authorized, when sitting as a court of error, to reverse the action of that court upon their own discretionary rules. The deposition had been received in evidence at the preceding term, under a written agreement of the parties, not limited in its terms, to any one trial, and containing a mutual waiver of all exceptions to the deposition, on account of informalities. And it is clear that neither of the parties could become a witness, unless by mutual consent, to testify whether the agreement was to extend to more than one trial.

Judgment of the county court affirmed.

ELIJAH FARR *v.* CHARLES BRIGHAM.

The repeal of the proviso to the statute of 1798, allowing equitable defences to promissory notes, negotiated, took full effect on the first day of January, 1837, and cut off all such defences accruing after that date, though the notes bore date anterior to that time.

Such defences depend on the law in force at the time they accrue, and not necessarily upon the law in force at the time the contract was executed to which they are offered.

THIS was an action brought by appeal to the county court, in which the plaintiff declared that, on the 29th of November, 1836, the defendant executed and delivered to one Ezra Sanborn, his promissory note of that date, made payable to said Sanborn or bearer, and, on that day endorsed by said Sanborn to the plaintiff, of which the defendant on the same day had notice. The defendant pleaded in bar, setting forth that, after the entering of the suit in court, he filed his declaration on book account against said Sanborn, and subsequently obtained, and filed in court, the report of an auditor that there was due him from Sanborn, the sum of $154.45, to ballance book accounts between them, which was accepted by the court; and averring that, at the time of being notified of said endorsement, to wit, on the first day of July, 1838, there was a balance of the items of account reported on by the auditor, due from said Sanborn to the defendant to an amount greater than the amount of said note and interest. The plaintiff replied the execution and endorsement of the note, and notice of the endorsement, on the 29th of November, 1836, as set forth in his declaration. The defendant rejoined that he was not notified of the said endorsement, until the commencement of this suit, on the 30th of April, 1839. To this there was a demurrer. The court overruled the demurrer, and rendered judgment for the defendant; to which the plaintiff excepted.

E. Farr and *L. B. Peck*, for plaintiff.

1. The note in question having been executed after the passage of the act of November, 1836, repealing the proviso to the act of 1798, which authorized such an off-set, and being negotiated to the plaintiff while current, is not subject to the off-set. The proviso to act of November 17, 1836,

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declares, "That nothing in this act shall impair any right which has accrued under the act to which this is an amendment." This proviso saves only such rights as had *then* accrued. To hold that all rights were saved which might arise at a period subsequent to the passage of the act, would be doing violence to the language used. Had the legislature intended to save rights that might accrue before the first day of January, 1837, when the act took effect, it is fair to presume that language would have been used clearly importing such intention. *Hutchins* v. *Taylor*, Law Reporter, Nov. No. 1842, p. 289.

2. If rights that existed on the first day of January, 1837, are within the saving of the statute, it does not affect the present question. The act of 1798 provided a new *remedy* for the recovery of claims due from the payee to the maker of a note. It permitted a recovery by way of offset. This *remedy* was taken away by the act of 1836. The *remedy* is not a right, within the meaning of the proviso. A payment made by the maker to the payee, before notice of the transfer, would be protected, while the right to offset a claim having no connection with the note, would stand on entirely different ground. *Hewitt* v. *Wilcox*, 1 Metcalf, 154.

A. Underwood, for defendant.

By the *proviso* to the act relating to actions by endorsees, passed October 30, 1798, there can be no doubt the defendant's plea is a good bar, unless controlled by some subsequent law. This proviso was repealed by an act passed November 17, 1836. But the act of 1836 was a *public law*, and by an act passed October 24, 1834, all public acts of that, or any future legislature, were to take effect, and be in force, from the 1st of January *next after their passage*, and not before, unless otherwise therein provided. The repealing act of 1836 took effect therefore, on the 1st of January, 1837, *and not before*; consequently the proviso to the act of 1798, was in force up to January, 1837, securing the right of set-off at the execution of the note.

But the plaintiff relies on the construction to be given to the *proviso* of the act of 1836, and insists that because *that* saved rights of set-off, which *had* accrued, none were saved accruing thereafter. The act of 1834, however, had the effect

of postponing the *proviso* of the act of 1836 to the first of January, 1837, and the words "has accrued" must therefore have reference to that time. But, 2d. If it be true that the words "has accrued" had reference to the 17th of November, 1836, it does not follow that rights accruing between that date and the first of Januuary, 1837, are impaired. They are preserved by the proviso of the act of 1798, which remained unrepealed until the 1st of January, 1837, up to which time the law of 1798 was the rule of action, governing and controlling the rights and liabilities of the parties. Law Rep. Vol. 10, p. 457 and 462.

The opinion of the court was delivered by

REDFIELD, J.—We think it very clear that the statute in question had no effect whatever, until the first day of January, 1837, and that it then took full effect, saving only rights, which had then already accrued, and not such as might thereafter accrue.

Now the right to off-set a matter, which should thereafter accrue, and not in faith of the note, or having any connexion with it, is no right that existed, at that time, nor until the offset accrued, and by force of the law *then* existing. And as it no where appears, in the pleadings, that this offset existed on the first day of January, 1837, it cannot prevail. This question might have been raised by demurrer to the plea, but as the matter extended to a rejoinder, which the county court held sufficient, we reverse that judgment, and adjudge the rejoinder insufficient. And as there are other pleadings in the case, it is remanded to the county court, to be there proceeded with.

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Adm'rs of J. Chapin, v. A. & W. Warden.

LUTHER CHAPIN and SARAH CHAPIN, Administrators of J. CHAPIN, *v.* ANDREW WARDEN and WILLIAM WARDEN.

An acknowledgment, by a debtor, that certain notes exist, and that he has an account to go against them, and a promise to call in a certain time, and have the notes and account settled, are sufficient to remove the bar interposed by the statute of limitations.

When there is no dispute about the facts which are insisted on, as taking a case out of the statute of limitations, the question involved, is one of mere law; but when the facts are doubtful, it is a mixed question of law and fact.

An issue, upon a replication of a new promise, to a plea of the statute of limitations, was tried by the court. The facts being undisputed, it was held that the decision might be revised by the supreme court, on exceptions.

THIS was an action of assumpsit, on two notes of hand, executed more than six years before the commencement of the suit, payable on demand, to the intestate, and signed with the name of the firm of Burnham & Wardens, which consisted of D. R. Burnham, David Warden and the defendants. The defendants pleaded the general issue, which was joined to the court. They, also, pleaded the statute of limitations, to which the plaintiff replied a new promise, within six years. Issue was joined, upon this replication, to the court.

On trial, the plaintiff, to prove the new promise, introduced one Daniel Meader, as a witness, who testified, that he was employed by the plaintiffs as their agent, in and about the business of settling the estate of said intestate, and that, by the direction of the plaintiffs, he called upon the said David Warden, and told him that the plaintiffs had two notes against said firm of Burnham & Wardens, of the same description of those in the plaintiff's declaration mentioned, to which the said David replied, that there were such notes, and they had an account to go against them; and, on another occasion, he promised to call, in two weeks, and have the notes and account settled. Upon the foregoing facts the court decided, that the testimony was not sufficient to take the case out of the statute of limitations, and rendered judgment for the defendants; to which the plaintiffs excepted.

E. Farr, for plaintiffs.

It is well settled law, *that the statute operates upon the remedy and not upon the debt;* and that the statute bar is

removed by *an acknowledgment of the continued existence of the debt;* also, that where exemption from liability is not expressly claimed, it is impliedly waived. 3 Vt. R. 177; 7 do. 55; 9 do. 74; 12 do. 263; 13 do. 567; 2 Stark. Ev. 895; 1 Sw. Dig. 304; 5 Bac. Ab. 2628; 3 do. 518; 2 Butr. R. 1099; 8 Mass. 133; 11 do. 452; 4 East, 600; 16 do. 420; 11 C. L. R. 502; 17 do. 191; 39 do. 349; 2 Aik. 350.

It would seem to follow from the above principles, and so are the decisions, that an admission that a claim is unsettled, without stating its amount, removes the statute bar, and opens up the whole claim for the consideration of the court, to find the true amount, from the evidence offered, and render judgment upon the merits, for such sum as is proved in court. See 2 Vt. R. 148; 13 do. 576; 39 C. L. R. 349.

To apply these principles to the present case:—defendant's saying that he would call and have the notes and account settled in two weeks, was an admission that the notes were unsettled, and implied a willingness to pay whatever sum should be found due; and if so, the judgment below was wrong, for that must have been pronounced upon the ground that the whole notes were barred by the statute, without any reference to a settlement, or to any balance that might be found due on them. This was giving *no force* to the admissions, and was treating the case as if defendants had said expressly that the notes were outlawed, or that they did not owe anything on them.

What the true sum due the plaintiffs would be, on the notes, cannot be ascertained on *this plea*. That was a question of fact, to be tried below, on other issues. 13 Vt. R. 576; 39 C. L. R. 349; 2 Vt. R. 148.

This case bears no analogy to those where defendant claimed he had paid the debt in a particular way, and plaintiff was allowed to disprove *that way of payment;* nor could plaintiff contest an account in the hands of defendant, which was never presented, on this plea.

A. Underwood, for defendants.

An acknowledgment of a debt, to remove the effect of the statute, must be such as shows a willingness on the part of the debtor to remain liable for it. *Phelps* v. *Stewart*, 12 Vt.

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R. 256; *Blake et al.* v. *Parleman*, 13 Vt. R. 574. It must be made, without any protest or disclaimer of liability, rebutting an implied promise. *Barlow* v. *Bellamy*, 7 Vt. R. 54. It is insisted there can be no promise *implied*, different from, or inconsistent with, the acknowledgment. *Phelps* v. *Stewart*, 12 Vt. R. 256; *Tome* v. *Barclay*, 1 Stark. R. 7; *Gould* v. *Shirley*, 17 C. L. R. 219; *Farr* v. *Lewis*, 19 C. L. R. 98; do. 326; *Tanner* v. *Smart*, 13 C. L. R. 273.

In the present case, the defendant said he knew that there were such notes. Had his admission stopped here, it is difficult to see how it could raise an implied promise to pay. He did not acknowledge the notes *due*, nor express any willingness to pay. But the admission was *qualified*. At the same time that he said he knew there were such notes, he said the *defendants have an account to go against them*. This is, in effect, *denying* the notes *to be due*. It is like saying they were paid. The qualification goes to rebut any implied promise *to pay*. Had he said he knew there were such notes, but they were more than six years old, or were barred by the statute, or had been paid, or that he could not pay them, or that some other person had paid them — the language would not have been clearer to rebut an implied promise to pay, than that used by the defendant. *Bridges* v. *Plumpter*, 22 C. L. R. 453; *Danforth* v. *Culver*, 11 Johns. R. 146; Angel on Lien, 238–9; *Lorence* v. *Hopkins*, 13 Johns. 288; *Sands* v. *Gilston*, 15 Johns. 511; *Bangs* v. *Hall*, 2 Pick. 368; *Bell* v. *Morrison*, 1 Pet. 351; 3 N. Y. Dig. 480, *et seq.*; *Miller* v. *Caldwell*, 16 C. L. R. 168.

The exceptions show that the issue was joined to the court; and the court having found the issue in defendants' favor, it is, therefore, insisted that their decision cannot be reversed in the supreme court. Whether there is, or not, a new promise, is a question of fact to be found by the jury; and that finding is not matter of law to be reviewed in the supreme court. *Kirby* v. *Mayo*, 13 Vt. R. 103; *Knott* v. *Farrin*, 16 C. L. R. 191; *Gould* v. *Shirley*, 17 do. 219; *Linsell* v. *Borsor*, 29 C. L. R. 319; *Morrill* v. *Frith*, 34 do. 373.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The court are frequently called on

to repeat the law, which we have considered as well settled, on the subject of the statute of limitations. The case before us, seems only to call on us to reiterate the decision, that an unqualified acknowledgment of a debt as still subsisting, and unpaid or unsettled, from which a promise to pay, or settle, may be inferred, especially when there is intention expressed to resist the payment, and rely on the statute, is sufficient to remove the bar to recovery, interposed by the statute of limitations. In this case there was an admission of the existence of the notes, and a claim that the defendant had an account to be set off against them, and a *promise to call and settle* both the notes and account, within a few days. There was, impliedly, at least, if not expressly, a promise to adjust the account and pay whatever balance might be found due on the notes; and it was sufficient, agreeably to all our decisions, to remove the bar created by the statute.

On the question whether this decision was such an one as can be revised in this court, it is to be remarked that every question of *law*, decided by the county courts, may be revised in this court. Their decisions on questions of fact are final. When the trial of the issue is by the court, it is sometimes difficult to distinguish between what they intended, as deciding a question of law, and what, as a question of fact. The case of *Phelps* v. *Wood & Stewart*, 12 Vt. R. 256, was determined by the county court, on an issue of fact joined to, and tried by, the court; yet the decision of the county court, on that issue, so far involved the determination of a question of law, that it was revised and reversed, on exception, by the supreme court. Where there is no dispute about the facts, and what the admissions are, which are insisted on, as taking a case out of the statute of limitation, their effect is a question of law. But if the facts are doubtful, it then becomes a mixed question of law and fact. This was the view taken by the court in New-York, in the case of *Clarke* v. *Dutcher*, 9 Cow. 674, and is undoubtedly correct. In the case before us, the facts were undisputed. The county court say, in the exceptions, "*upon the foregoing facts*, the court considered the testimony was not sufficient 'to take the case out of the statute of limitations." This was a decision of a question of law arising from the facts, and is subject to be revised here on exceptions.

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The judgment of the county court is reversed, and a new trial awarded.

Hobart v. Wardner.

ADAM HOBART *v.* AMOS WARDNER.

The county court have original jurisdiction of a suit, upon a promissory note, exceeding forty dollars, and less than one hundred dollars, where the suit is by trustee process.

Such suit will not be dismissed for want of jurisdiction in the county court, though the trustee should, on trial, be dismissed, in cases where the principal defendant appears in the suit, or where the writ issues as a general attachment, and is served by attaching personal property in possession.

THIS was an action originally commenced in the county court, against the defendant as principal debtor, on a promissory note, for the sum of $75.87, dated the 27th of April 1840, and against George W. Wardner as his trustee. The writ was served on the principal debtor by attaching his property in possession, and was entered at the December term, 1841, at which term said George W. Wardner made his disclosure, and judgment was rendered that he was not trustee. Judgment was also rendered against the defendant, who reviewed. At a subsequent term of the court, the defendant moved that the cause be dismissed for want of jurisdiction of the court—the suit being founded on a note for less than $100. The court overruled the motion; to which the defendant excepted.

J. L. Buck, for defendant.

Justices of the peace have jurisdiction in all civil actions of this nature, where the debt or other matter in demand does not exceed one hundred dollars. Rev. Stat. 170, § 7. In this case, both the declaration and exceptions shew that the note upon which the suit was brought, was less than one hundred dollars, including all the interest thereon. County courts have original jurisdiction in all civil actions, except such as are made cognizable by a justice. Rev. Stat. 160, §7.

The only ground upon which it can be insisted that the court had jurisdiction of this action is, that a trustee was summoned in the original writ, who, it appears by the exceptions, was, upon his disclosure, adjudged not to be trustee, and was discharged.

It is insisted that when a trustee is discharged, the suit stands on the same ground as if none had been summoned; and, in this case, had there been no trustee, the county court could have had no jurisdiction whatever. At the term of the court when the motion to dismiss was filed, the suit stood upon the docket as a suit simply between the plaintiff and defendant; and such was its true character. If the fact that a third person is summoned as trustee, gives the county court jurisdiction, then the plaintiff may give jurisdiction by his own act, where the law never intended it should be had.

It may be insisted that, when a trustee is summoned, in *good faith*, the court should retain the cause, althongh the trustee be discharged. If this rule were adopted, it would be necessary, in every case of this kind, to have a trial upon an issue whether the trustee was summoned in good faith.

Again: the defendant is subjected to unnecessary costs by the mere act and choice of the plaintiff, if this court sustain the jurisdiction of the county court.

E. Weston, for plaintiff.

The writ and proceedings show that a justice had not jurisdiction of this action. It necessarily follows that the county court had; and the question of the jurisdiction will be determined by inspection of the writ and proceedings. If the county court, at the time the action was entered on the docket of the court, had jurisdiction of the same, no subsequent proceedings could oust the court of the jurisdiction. *Stone* v. *Winslow*, 7 Vt. R. 342.

If it had jurisdiction, it could proceed and render a judgment for a less sum than $100, as in the cases of appeals from a justice—of uncertain damages—where off-sets are allowed—and where there have been part payments. In the two latter instances, it is often the case that the *matter in demand* is, in fact, less than $100, and still, the jurisdiction is sustained.

The opinion of the court was delivered by

REDFIELD, J.—This is an action upon a promissory note for seventy-five dollars, without endorsements or payments, sued by trustee process originally in the county court. The writ was served upon the principal defendant, by attaching his property in possession, as well as in the hands of the

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trustee. He appeared in the suit and reviewed it. The trustee, on hearing, was discharged, and the principal defendant then moved the county court to dismiss the action, for want of jurisdiction. That motion was overruled, and, as we think, for good cause.

The revised statutes p. 190, § 1, provide that "all actions, founded on contract, entered into since the first day of January, 1839, (and this case comes within the provision,) may be commenced by trustee process." Section 2 provides, that "no such process shall be commenced before a justice when the matter in demand shall exceed forty dollars. By another provision of the statute, the county court have exclusive jurisdiction of all civil actions, not made cognizable before a justice. Section 9 of the trustee act provides, that if the trustees be discharged, the "plaintiff shall not proceed in the suit against the principal defendant, unless there has been such a service of the writ on him, as would be sufficient in an action commenced in the ordinary way, or unless he shall actually appear and answer to the suit."

In this case both these grounds of retaining the suit in the county court, concurred. There was then, *no* ground for dismissing it, unless it could be made to appear that the process against the trustee was merely colorable, and for the purpose of giving the county court jurisdiction. This is not to be *presumed*; and, as the suit could not have been brought elsewhere, and the trustee was discharged, contrary to the plaintiff's expectation, that will not effect the question.

Judgment affirmed.

ARAUNAH SPEAR *v.* TRUMAN B. PECK.

A balance found due on settlement, may be charged over in a new account, and where the settlement is not impeached, may be recovered in a book action.

The county court have appellate jurisdiction, in a case where the balance charged in the new account, and the other items of charge, do not exceed one hundred dollars, though the items embraced in the settlement, and the other items, should exceed that sum.

THIS was an action of book account, appealed from a justice of the peace. There was a judgment to account and reference to an auditor.

The auditor reported that the plaintiff exhibited an account against the defendant, as follows, —

"On a settlement on book, January 28, 1841, $29.50
To 8 tons of straw, 16.00
To use of horse, and 18 acres of land, 25.00;

and that it appeared before him, that the debit side of the plaintiff's account, on said settlement, exceeded one hundred dollars.

The auditor, also, reported, that the defendant exhibited an account against the plaintiff, amounting to $179, of dates anterior to said settlement; and he reported in the alternatives—submitting to the court, among other questions, whether an action of book account could be sustained on a balance found due, on settlement. The court decided that the book action could be sustained for such balance, and rendered judgment for the plaintiff; to which decision the defendant excepted.

The defendant, also, filed his motion to dismiss, for the cause that the debit side of the plaintiff's account exceeded one hundred dollars; which motion was overruled by the court; to which the defendant, also, excepted.

W. Hebard, for defendant.

I. The action is on book, which involves a particular inquiry into all, and every, of the items of the accounts between the parties. In this case, no such inquiry was had, but the plaintiff relies, alone, upon a balance, found due on settlement, without showing the items on which the settlement was made. R. S. 219, 220.

II. By the auditor's report, it appears that the debit side of the plaintiff's account was more than one hundred dollars, and, consequently, the justice had no jurisdiction. It also appears that the defendant's account was nearly $200.

III. Action on book will not lie on a mere balance, struck on settlement. R. S. 219, 220. 1. Because there is nothing for an auditor to do, in hearing, examining, and adjusting the accounts between the parties. R. S. 219, §3, 4. 2. Because, in this case, it is not true that the "defendant has refused, and still does refuse, to settle and adjust the account of the plaintiff." See form of declaration. 3. Because it would not be possible for the auditor to report the items of

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the plaintiff's account, and his reasons for allowing and disallowing. 4. Because the only proper form of action on a settlement, is, *insimul computassent*, or *indebitatus assumpsit*. 5. Because, the legislature never intended to give the plaintiff a right to swear himself, to a *settlement, to sustain a book action.* Courts have permitted the defendant to testify to a settlement for the purpose of defeating the book action, but never the plaintiff, to sustain it.

Araunah Spear, pro se.

The opinion of the court was delivered by

BENNETT, J. — The defendant relies only upon two exceptions, which need only be considered.

It is said the action of book debt will not lie to recover a balance found due on settlement. The auditor reports that the parties settled their accounts, and agreed upon the balance due, and it was charged over, in a new account.

Though assumpsit upon an account stated, is the ordinary action brought, to recover a balance found due on settlement, yet it is not uncommon to charge such balance as an item in a new account. The case of *Gibson* v. *Sumner*, 6 Vt. R. 163, is an authority to show, that, in a case in which the settlement is not impeached, the balance found due may be recovered as an item in the account, in the book action.

It is said, that, as it appears that the plaintiff's account, when settled, was over one hundred dollars, the county court had no appellate jurisdiction.

There was no attempt in this case to impeach the settlement; and the case of *Gibson* v. *Sumner* is an authority to show, that when the balance found due, on settlement, and charged to a new account, and the other items, together, do not exceed one hundred dollars, a justice of the peace has jurisdiction, though the items settled, and the other items, added together, may exceed that sum.

In such case, the county court would, of course, have appellate jurisdiction.

The motion to dismiss, was properly overruled.

The judgment of the county court is affirmed.

ELIHU NORTON *v.* SOLOMON DOWNER, WOOSTER DOWNER, and HORACE W. DANA.

It is no valid objection to the sustaining of an action upon a promissory note, by the endorsee, that the note was made payable to the order of, and endorsed by, one of the members of a firm.

Dictum. Such note, when endorsed, is, *prima facie*, a good cause of action in the hands of the endorsee.

THIS was an action brought by the plaintiff, as endorsee of a promissory note of S. Downer & Co., dated October 10, 1838, and made payable to Horace W. Dana, or bearer, and by him, for value received, endorsed to the plaintiff on the 1st of May, 1840. Plea, general issue, and trial by jury.

On the trial in the county court the plaintiff proved that the defendants composed the firm of S. Downer & Co.; that Wooster Downer, one of the defendants, executed the note, by affixing thereto the name of the firm, and delivered it to the said Dana, another of the defendants; and that the endorsement of the same was in the hand writing of Dana. On this evidence, the court charged the jury that the plaintiff was not entitled to recover. Verdict for defendants, and exception to the charge of the court, by the plaintiff.

L. B. Peck & Wm. Hebard, for plaintiff.

As this note was given in the usual form, for a good consideration, made by one legally competent to make and sign it as he did—made and delivered to a person legally competent to receive the promise and enforce it and by him duly endorsed to the plaintiff,—the plaintiff insists that the note is not void, and that the charge of the court below was erroneous.

The plaintiff is an innocent *endorsee;* and notes in the hands of such are never void, unless the consideration is money won at play, or when they are given on a usurious debt. 3 Kent's Com. p. 79. The equity of the case is with the plaintiff. By a recovery, the plaintiff obtains nothing to which he is not entitled, and the defendants part with nothing which they have a right to retain.

The objection to the note is one exclusively of a technical character, growing out of the remedy, and growing out of the rule that a party cannot sue himself; and it would seem

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that when the note is endorsed, the objection ceases to operate. This case is like that of a note made payable to one's own order, upon which no action can be sustained, until it is endorsed, when it becomes a legal contract, which may be enforced against the maker, although he is both payer and payee. *Pitcher* v. *Barrows*, 17 Pick. 361; Chitty on Bills, 28, 8th Edition; *Russell* v. *Swan*, 16 Mass. 314; *Burnham*, v. *Whittier*, 5 N. H. Rep. 334; *Parker* v. *Malcomber*, 18 Pick. 505; *Little* v. *Rogers*, 1 Metcalf, 108; *Nevins* v. *Townsend et. al.*, 1 Con. Rep. 5. (6 Conn. old series;) *Kinsley* v. *Robinson*, 21 Pick. Rep. 327; *Dwight et al.* v. *Scovil et al.* 2 Day, 654; *Smith* v. *Lusher*, 8 Cow. 688.

E. Weston and *L. B. Vilas*, for defendants.

The note in question was dated October 10, 1838, and not endorsed until about two years after; and being payable on demand, was uncurrent. The note being signed by the firm of which Dana, the payee, was a member, it will not be contended could have been sued in his name. That a suit may be sustained in the name of an endorsee, for a valuable consideration, on such a note, is shown by the Massachusetts authorities; but it is believed that the doctrine leads to fraud, and, as it never has been adopted here, it would be the safer policy to reject it entirely.

But if the court hold that the suit can be sustained on this point, then we contend, that the plaintiff cannot recover, without proving a consideration. In this case no consideration was shown by the endorsee, and hence it is contended that he did not make a *prima facie* case, and the county court were right in directing a verdict for the defendants. *Heath* v. *Sansom and Evans*, 22 Com. Law. Rep. 78, and the authorities there cited.

The opinion of the court was delivered by

Redfield, J. — The objection to the plaintiff's claim, that the note was originally executed by all the defendants, as a partnership, and made payable to one of the firm, Horace W. Dana, who endorsed the note to the plaintiff, is merely technical; and although avoidable, at law, while the note remained in the hands of the payee, as it created an insurmountable defect of legal parties, as the same person cannot be both plaintiff and defendant — we think, is whol-

ly removed by the negociation of the note. The same view has been taken of this matter by the courts in other states. *Pitcher* v. *Barrows*, 17 Pick. 361; *Nevins* v. *Townsend*, 6 Conn. R. 5; *Smith* v. *Lusher*, 8 Cow. 688.

This is really the only question which properly arises on the bill of exceptions, being the only one decided by the court below. As this ended the case, all other questions were properly removed from the consideration of the court below, and are not, strictly, before this court. We have, however, not found any ground of doubt, that the note and endorsement, does, *prima facie*, show a good cause of action in the plaintiff. It is not for us to presume, or to conjecture, that this note was given as a receipt for the portion of capital invested by the payee in the concern. And what avail such proof, if offered by the defendants, should have, if any, it is not, now, necessary to consider.

Judgment reversed, and a new trial granted.

ISAAC TYSON, Jr., *v.* THOMAS J. DOE.

In the case of a contract to deliver certain furnace castings, to a certain amount, upon a credit of a year, it was held, that a refusal to receive a load of the castings, put an end to the contract, as to the obligation both to deliver the balance, and to give the stipulated credit for the amount delivered; and that an action of book account might be sustained immediately, for the quantity delivered.

T. and D. made a contract, by which T. was to furnish plough irons and D. was to wood them, and return half the ploughs. D. set aside, under the contract, twelve ploughs, as the property of T., six of which were subsequently attached and sold on execution as D.'s property. *Held*, that T. could not maintain an action of book account against D. to recover their value.

THIS was an action of book account. There was a judgment to account, and reference to an auditor.

The auditor reported, that the plaintiff's account against the defendant, embraced, among other things, charges for cultivator teeth, and plough castings, to the amount of $285.92, delivered the defendant, under a verbal contract, whereby the plaintiff agreed to deliver to the defendant one thousand cultivator teeth, and plough castings enough to make the amount $500, at 4½ cents per

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pound, to be paid, $50 in work, on demand, and the balance in cash, in one year; that, within about two months from the making of the contract, and a short time before the commencement of this suit, the defendant failed, and that after his failure, and before the bringing of this suit, he refused, to receive a load of castings sent him under the contract. Upon this statement, the auditor submitted to the court, whether the plaintiff ought to recover the $285.92, for the castings delivered.

The auditor also reported, that the plaintiff and defendant had made a contract, by which the plaintiff was to furnish the defendant plough irons, and the defendant was to wood them, and return half the ploughs; and that, after the failure of the defendant, he set aside, as the property of the plaintiff, twelve ploughs which he had thus wooded for him under the contract—six of which were, subsequently, attached and sold on execution, as the property of the defendant, and the remaining six were received by the plaintiff; and that the plaintiff had charged the said six ploughs, thus attached and sold, in his account against the defendant, at $39.72—the question in regard to the allowance of which, the auditor submitted to the court.

On the coming in of the report, the county court rendered judgment thereon, in favor of the plaintiff, for said two sums of $285.92, and $39.72; to which decision the defendant excepted.

E. Farr, for defendant,

If the refusal of defendant to receive the load of castings, had the effect of releasing the plaintiff from the obligation to furnish the balance, its effect would be to give the plaintiff the same rights as if he had furnished the whole $500, not varying the credit or mode of payment; and, in that case, the plaintiff is entitled to furnish the balance, or make a tender of them, or recover for the whole without doing so.

The $39.72 could only be recovered of the officer who took the ploughs.

J. Berry and J. W. D. Parker, for plaintiff.

The refusal by the defendant to receive the load of castings, offered by the plaintiff on the contract, was a putting an end to the contract by the defendant. The plaintiff was there-

upon discharged from a further fulfilment on his part, so that the defendant could not, subsequently, by his own act, restore himself to his rights under it. 8 Cow. R. 63.

If the defendant repudiated or violated the contract, or was not in a situation to perform it, as stipulated, the plaintiff was no longer bound by it, and may recover for the property previously delivered. *Harrington* v. *Wells*, 12 Vt. R. As this part of the claim is for specific property, delivered at a price fixed and agreed upon by the parties, and such as may, ordinarily, be a subject of book charge, the special agreement, as to the time and mode of payment will not exclude the plaintiff from the right to charge on book. *Boardman* v. *Keeler*, 2 Vt. R. 65; *Fry* v. *Slyfield*, 3 Vt. R. 246; *Blish et al.* v. *Granger*, 6 Vt. R. 340; *Way* v. *Wakefield*, 7 Vt. R. 223.

The report shows that twelve ploughs were set apart by defendant as belonging to the plaintiff, and were conceded, and treated by him as the plaintiff's property. The defendant derived a substantial benefit from the sale of these ploughs by the extinguishment of debts outstanding against him; and justice requires that he should render an equivalent. *Dyer* v. *Jones*, 8 Vt. R. 205; *Gilman et al.* v. *Hall*, 11 Vt. R. 513–14.

The opinion of the court was delivered by

ROYCE, J.—The questions arising upon the report of the auditor, relate to that class of items in the plaintiff's account which make up the sum of $285.92, and to the six ploughs, amounting to $39.72. In reference to the former, it is first to be determined, whether any action could properly be commenced, until the time of payment originally agreed upon had passed; and secondly, whether the action on book account was the proper action.

So long as a contract, by its terms, remains executory, it may be rescinded, or put an end to, in various ways. This may sometimes be done in virtue of a right expressly reserved to one party alone, or to each of the parties. So the contract may be subject to some express or implied condition, the non-performance of which shall operate to annul it, at the election of the party entitled to insist on the condition. It may be superseded by another agreement upon the same subject, or the parties may renounce and abandon it, by mu-

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tual consent. And although we find it laid down, as a general rule, that the neglect or refusal of one party to fulfill a contract will not entitle the other to rescind it, unless they can both be placed *in statu quo*; yet the rule, in this extent, is understood to be applicable only to such an entire recision of the contract, *ab initio*, as shall revest in each party the rights he possessed, antecedently to the contract. Even then it may be doubted whether the rule is without exceptions. *Giles* v. *Edwards*, 7 T. R. 181; *Gray* v. *Hull*, 11 Johns. R. 441. There is, likewise, a class of cases, which allow a party to sue, in general assumpsit, for a part performance of a special contract, and absolve him from a further execution of it, because the other party has violated the contract, or refused further to act under it. These cases do not always proceed upon the notion of a strict and absolute recision of the contract, since they often permit the partial execution of it to stand *pro tanto*. *Planché* v. *Colburn*, 8 Bing. 14. See also 1 Pick. 57, and 4 Wend. 285. Of this latter description is the present case. It was never supposed that the property in the articles, already delivered under the contract, was to revest in the plaintiff, though the conduct of the defendant fully authorized him to suspend any further delivery. The contract thereupon ceased to be executory on the part of the plaintiff, his accruing obligations under it being thus discharged. And we think he became entitled to treat the stipulation for a year's credit as being equally at an end. To allow the defendant to insist on that stipulation, whilst he repudiates others, would be to enforce a different contract from that which the parties entered into. It may be admitted as generally true, that where there is a mere waiver of further performance, by mutual assent, the contract, in other respects, will remain in force. *James* v. *Cotton*, 7 Bing. 266. In this case, however, there was no such mutual waiver by consent, but a violation of the contract by one party, which prevented its further execution by the other.

The view which has been taken of the contract disposes of the next point. Although the articles charged were delivered under a special contract, they were such as are usually charged on book; and the parties evidently intended that an account on book should be made, not only of the articles

delivered on one side, but of the services to be rendered, and other payments to be made, on the other. And the provision for giving credit having ceased to bind the plaintiff, he was at liberty to bring his suit, either on book account, or in general assumpsit.

The claim for the six ploughs is entirely of new impression, especially in this form of action. It is not for property sold or delivered to the defendant, or for which he has ever consented to be accountable. The claim arises from a disposition of the ploughs, which took place without the concurrence of either of these parties. They were attached and sold on process against the defendant, after he had set them apart as the property of the plaintiff. And if the designation was effective to pass the property and possession, the attachment was a trespass upon the plaintiff, for which he has a remedy. If the designation was insufficient for that purpose, the plaintiff might raise the question, whether he was bound to account for the ploughs, as for property purchased of the defendant; and if once bound, whether the liability had not become extinguished, or a counter liability imposed upon the defendant, since the property ultimately went for his benefit. But all this is beyond the legitimate scope of the book action. For the purpose of recovering the price or value of property, this form of action should be limited to cases of actual sale, or to cases where the party has admitted his indebtedness and liability *as upon a sale;* in other words, where he has consented that his previous appropriation of the property should be treated as a purchase of it. *Pangborn* v. *Saxton*, 11 Vt. R. 79; *Starr* v. *Huntley*, 12 Vt. R. 13. We are clearly of opinion, that, for this portion of his account, the plaintiff should not have had judgment. The judgment below is, therefore, reversed, and another judgment is to be entered up in favor of the plaintiff, including the $285.92, but excluding the $39.72.

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Administrators of Elias Lyman *v.* Josiah Little, Erastus Chamberlain, William Atkinson and Anna Atkinson.

(In Chancery.)

A decree of foreclosure will not be made against a defendant who holds by an older and adverse title to the mortgagor and mortgagee.

A mortgage will not be corrected as to description, on the ground of mistake, unless on full proof.

When a mortgagee has been compelled to pay an existing incumbrance, as well on the lands mortgaged to him, as on other lands held by a defendant, the latter will be decreed to pay his proportion.

A decree in chancery against an original mortgagor is evidence that the debt is not paid, so as to prevent the operation of the statute of limitations; and so is an acknowledgment of a defendant, who holds adverse to the mortgagee, made within fifteen years.

A bill and decree in chancery, stated in a bill, and admitted in the answer, need not be filed as an exhibit.

A decree of a chancellor as to cost, will rarely be altered, on appeal.

This was an appeal from a decree of the court of chancery.

The orators in their bill, set forth and charged, in substance, that, to secure the payment of a note of hand, to Ephraim Lacy, of $306, on or before the 1st of October, 1807, Raymond Chamberlain, on the 15th of September, 1806, mortgaged to said Lacy, among other lands in Newbury, one half of lot No. 2, one eighth of lot No. 1, and one eighth of lot No. 9, in Musquash Meadow in said Newbury; that said Raymond Chamberlain and Joseph Chamberlain, being tenants in common of said lot No. 2, and of one fourth of said lot No. 1, did, in the year 1811, by a parol agreement, exchange the same with Edward Little, son and agent of Josiah Little, for three fourths of said lot No. 9, they owning the other fourth, and three acres of lot No. 10; and that, in pursuance of said agreement, each of the parties entered into possession of the land so agreed to be received in exchange;—

That, on the 15th of July, 1815, Raymond Chamberlain conveyed in fee, to Erastus Chamberlain, the whole of the premises embraced in the mortgage to Lacy, informing him of the existence of said mortgage, and, at the same time, taking from him a writing, agreeing to redeed the premises, upon being indemnified for the payment of a certain sum of

money for him to Elias Lyman and Miles Olcutt; and that, on the 20th of February, 1816, Raymond Chamberlain, and the heirs of said Joseph Chamberlain, who had deceased, quit claimed to Erastus Chamberlain all their right and title in the aforesaid premises;—

That, on the 7th of March, 1818, Erastus Chamberlain mortgaged to Elias Lyman, the intestate, among other lands, the said lot No. 2, and one quarter of each of said lots No. 1 and 9, to secure the payment of a note of $2000 payable on demand, with interest; that the interest had been paid, and endorsed on said note up to the 8th of September 1824, but that the principal and balance of interest remained unpaid;—

That, in March, 1831, Lacy brought his bill to foreclose his said mortgage, against Erastus Chamberlain and the said Elias Lyman; that, pending said suit, Lyman deceased, and the orators were appointed administrators and made parties, as such; that, in March, 1835, Lacy obtained a decree of foreclosure against said Erastus and the orators, for $828.24 debt, and $99.08 costs, which the orators paid on the 24th of March, 1835, in pursuance of said decree; that the intestate, when he took said mortgage of lot No. 1, and a quarter of lot No. 2, did not know that they had been exchanged to Edward Little, or that he was in possession of the same, or of any part of the mortgaged premises; and that the said premises were not of sufficient value to pay both of said mortgages.

And the orators further alleged, that, on the 23d of July, 1817, the said Edward Little conveyed, by deed of quit claim, to the said Josiah Little, all his lands in this state, without giving any particular description thereof, and that he held them in trust for said Josiah; that, on the 24th of September, 1827, the said Josiah, by his deed of that date, but not acknowledged and recorded, until the 10th of February, 1831, conveyed to Josiah Little, Jun. (one of the present defendants) said lots No. 1, and 2; that, at the time said deed was executed, both of said Littles knew of the existence of the mortgages to Lacy and Lyman, and that they covered lot No. 2, and one fourth of No. 1; that Edward Little knew that the mortgage to Lacy thus extended to Nos. 1 and 2, when he received them in exchange for three fourths of No.

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9, in 1811, and that Josiah Little, senior, knew the same, when he took the conveyance from Edward Little, in 1817.

And the orators further alleged that, on the 28th of January, 1826, Erastus Chamberlain quit claimed to Josiah Little, senior, all his interest in the lands mortgaged to Lyman, and also to lots No. 9 and 10, which Raymond and Joseph Chamberlain had received in exchange for Nos. 1 and 2—which deed was executed to secure a debt of about $1000; that, on the 28th of August, 1829, Josiah Little, senior, reconveyed to Erastus Chamberlain, all the said premises excepting the three fourths of No. 9, and the part of No. 10 which had been received in exchange for 1 and 2; that, on the 31st of March, 1835, Erastus Chamberlain, in order further to secure the payment of said $2000 note, conveyed to one of the orators, for the benefit of them all, as administrators of Lyman, those parts of Nos. 9 and 10, received in exchange as aforesaid.

And the orators further alleged that Josiah Little, senior, deceased, in 1930, and Josiah Little, Jr., (present defendant) was appointed his administrator; and that, on the 16th of March, 1832, the heirs of said deceased Little conveyed all their interest in Nos. 9, and 10, received from the Chamberlains in exchange for 1 and 2, to Anna Atkinson, wife of William Atkinson (defendants in this suit.)

And the orators further alleged, that in and by the deed from Raymond Chamberlain and the heirs of Joseph Chamberlain, to the said Erastus, lot No. 2, and one fourth of No. 1, were specifically conveyed, but that they were informed that, under said deed, Erastus took possession of lot No. 9, and the part of No. 10, received from Edward Little in exchange for 1 and 2, instead of taking possession of 1 and 2—of which fact the intestate had no knowledge when he took the mortgage from Erastus, nor during his life time; and that there was a mistake in drawing said mortgage—the said Erastus intending to convey No. 9, and part of No. 10, received in exchange for 1 and 2—which mistake was known to Josiah Little, senior, when No. 9 and 10 were quit-claimed to him by Erastus in 1826.

And the orators further alleged, that Josiah Little, senior, in his life time, claimed to hold lot No. 2, and one fourth of lot No. 1, under, and by virtue of, said parol exchange be-

tween Edward Little and R. and J. Chamberlain, and such parts of Nos. 9 and 10, as said Edward passed, in exchange, to R. and J. Chamberlain, by virtue of the deed from Erastus Chamberlain; that defendant, Little, claimed title in Nos. 1 and 2, under said deed from his father, Josiah Little senior, in 1827; that Atkinson and his wife claimed title in Nos. 9 and 10, under said deed from the heirs of J. Little senior, and that Erastus Chamberlain had continued in the open occupancy of Nos. 9 and 10 ever subsequent to his conveyance thereof to J. Little senior, in 1826.

The orators thereupon prayed, that the defendants, Erastus Chamberlain and Josiah Little, be decreed to pay to them the sum paid by them on the Lacy mortgage, with interest, or be foreclosed of all equity of redemption in the premises contained in said mortgage; and that all the defendants be decreed to pay the orators the sum due in equity on the mortgage executed by Erastus Chamberlain to the intestate, or be foreclosed of all equity of redemption in the premises therein conveyed;—or, in case the court should be of opinion that said mortgage deed to the intestate could not cover and hold lot No. 2, and one fourth of lot No. 1, that then, said deed might be corrected, according to the intention of said Erastus, so as to extend to, and cover, such parts of No. 9 and 10, as were received in exchange for 1 and 2; and that Atkinson and wife might be foreclosed of all equity of redemption in said Nos. 9 and 10, and that they should be decreed to release the same,—and for further relief.

The defendant, Little, in his answer, admitted the execution of the mortgage to Lacy in 1806—and the exchange of lands, in 1811, between the Chamberlains and Edward Little, as stated in the bill, and that the parties went into immediate possession, according to the exchange. And he alledged, that, in 1812, said Edward was in the open and visible possession of lots No 1 and 2, and so continued in possession until the 29th of May, 1815, claiming to own them, when he put Josiah Little senior, into possession, under a deed of that date, and on the 23d of July, 1817, he again deeded the same, with other lands, to the said Josiah, who continued in the open and visible possession thereof, claiming to own the same, until the month of September 1827, when he deeded said lots to Josiah Little the defen-

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dant, who had been in possession thereof, claiming to own them, until the filing of his said answer.

The said defendant, in his answer, further alledged that he moved into Newbury in 1813, when Joseph Chamberlain was in possession of lot No. 9, and three acres of No. 10, and so continued in possession until his death in 1815; and he admitted the conveyance from Raymond Chamberlain to Erastus Chamberlain, in 1815, and from the said Raymond and the heirs of Joseph Chamberlain, to said Erastus, in 1816, as stated in the bill. He also alleged, that, in 1826 or 1827, Erastus Chamberlain informed him that he knew of the Lacy mortgage when Raymond deeded to him in 1815, but supposed it was paid; and he alleged that, when that deed was executed, Josiah Little, senior, was in the adverse possession of lots No. 1 and 2, and that he was in such possession in 1818, when the mortgage from Erastus Chamberlain to the intestate was executed, as stated in the orators bill; and that he did not believe that any mistake in the description of land was made in said mortgage.

And said defendant further answering, admitted that, on the 25th of January, 1826, Erastus Chamberlain was in possession of lot No. 9, and about three acres of No. 10, and conveyed the same, with other lands, to Josiah Little, senior, by deed of that date, for the consideration of $800; and that, in August, 1829, the said Little reconveyed to the said Erastus, the lands thus conveyed, except Nos. 9 and 10; but he alleged that said Erastus paid nothing, and was to pay nothing, for said deed; that, Josiah Little, senior, and the defendant who acted as his agent, considered that the lands thus reconveyed were encumbered to their full value by the mortgages to Lacy and Lyman, and that the only object in reconveying was to avoid being joined in a suit, threatened by Lacy on the mortgage to him.

And the said defendant further admitted, that the proceedings in the suit on the Lacy mortgage were as stated in the bill, and that the orators paid to Lacy the sums of money therein set forth; that when he, the defendant, received from said Josiah, senior, the deed of the 24th of September, 1827, of lots Nos. 1 and 2, he and the said Josiah knew of the existence of the Lacy and Lyman mortgages, and that they covered No. 1, and one fourth of No. 2. He further

admitted the death of said Josiah in 1830, and that, in 1832, his heirs conveyed Nos. 9 and 10 to Anna Atkinson, as stated in the bill; and he alleged that said Josiah, senior, did not claim to hold lot No. 2, and one fourth of No. 1, by virtue of said exchange of lands with Edward Little, in 1811, but that he did claim to hold the same by virtue of the deed or deeds from said Edward, who, the defendant denied, acted as the agent of said Josiah, senior, in making the exchange.

Atkinson and wife made answer, varying, in no essential particular, from the answer of Little.

No answer was made by Erastus Chamberlain, and the bill, as to him, was taken as confessed.

The answers of Little and Atkinson and wife were traversed, and testimony was taken, the import of which sufficiently appears in the opinion of the court.

The evidence having been taken and published, it was ordered by the court that it be referred to a master to ascertain and report the amount due upon the Lacy mortgage, and the cash value of all of lots 1 and 2, included in that mortgage, and the cash value of the other lands included in said mortgage; and also that said master ascertain and report the sum due upon the mortgage of E. Chamberlain to the intestate, and the cash value of the lands included in that mortgage. The master reported that the Lacy mortgage amounted to $1283.09, including $96.08 cost, and that the cash value of the portion of Nos. 1 and 2, included in that mortgage was $996, and of all the other lands included therein, $1075. He also reported that the cash value of all the lands included in the mortgage to the intestate was $5143. Whereupon the court decreed that the defendant Little pay to the orators, such proportion of $1323.95, (being the amount of said mortgage debt to Lacy, cost and interest) as the value of that portion of lots No. 1 and 2, included in the Lacy mortgage, bore to the value of the whole lands included therein (which proportion the court found to be $636. 38), or be foreclosed of all equity of redemption in said Nos. 1 and 2. And the court further decreed that the said Erastus pay to the orators the balance of the Lacy mortgage and costs, and also the amount due upon his mortgage to the orators, &c. And it was further ordered and decreed, that,

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as to the said Atkinson and wife the bill be dismissed with costs.

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Wm. Upham, for defendants.

I. As to the rights of the orators under the Lacy mortgage: That mortgage it is true has been paid by the complainants, but for the purpose of enabling them to avail themselves of Erastus Chamberlain's subsequent mortgage of the same lands to their intestate, Lyman. The complainants now claim to stand as the assignees of the Lacy mortgage and insist that the defendant, Little, who claims but a small part of the lands covered by the mortgage, should pay them the whole amount of it, with the costs of foreclosure. This claim we resist, and contend that the orators are entitled to no relief against Little, in consequence of having paid off that mortgage.

The possession taken by Edward Little, of lots No. 1 and 2, at the time of the exchange of lands with J. and R. Chamberlain, in 1811, was *adverse* to the whole world. He entered upon, and occupied both lots as his own, acknowledging no right in any other person to interfere with his possession. His entry was not under a conveyance from Raymond Chamberlain, Lacy's mortgagor, but under the contract of exchange made with Joseph and Raymond Chamberlain. It was therefore a disseizin of Lacy; and the continued *adverse* possession of both lots, kept up by Edward Little and others claiming under him, to the present time, has issued into a right of possession upon which the defendant, Little, can stand against Lacy and all others claiming under or through him. *Livingston* v. *Peru Iron Co.*, 9 Wend. 511; *Wilson* v. *Walkins*, 3 Peter's R. 43; *Jackson* v. *Wheat*, 18 John's R. 40, 44; *Smith* v. *Loveland*, 10 Johns R. 356; *Smith* v. *Brutis*, 9 do. 180; *Van Dyk* v. *Van Buren et al.*, 1 Caine's R. 83, 90; 8 Pick. 272; *Cadwell* v. *Spriggs' Heirs*, 1 B. Munroe's R. 370; *Jackson* v. *Camp*, 1 Cow. 605, 609; *La Loimbois* v. *Jackson*, 8 Cow. 599; *Jackson* v. *Ellis*, 13 John. 120; *Ewing* v. *Bennett*, 11 Peters, 52; *Dexter* v. *Harris*, 1 Mason, 531, 536; 18 John. 355; *Robinson* v. *Douglas*, 2 Aiken 364.

But if we are mistaken in our view of Edward Little's possession of the lots in question, we insist, that there can be

no doubt as to the *adverse* character of Josiah Little, senior's, possession. He entered upon the lots in May, 1815, under a deed from Edward Little. His possession was open and exclusive. He claimed to own the lots, and, in September, 1827, conveyed them to Josiah Little the defendant, who has been in the open and exclusive possession of them ever since, claiming to own them. Nothing more could be necessary to constitute an adverse possession. 1 B. Munroe's R. 45.

It has been repeatedly ruled, said the court, in *Jackson* v. *Ellis*, (13 John. 120), "that an entry under *color or claim of title*, is sufficient to constitute an *adverse* holding," and in the case of *Smith* v. *Louilard*, (10 John. 356), Kent, C. J. said "that after a continued possession of twenty years under pretence or claim of right, the actual possession ripens into a right of possession, which will *toll* an entry."

In addition to the authorities already cited, *vide* the following: *Little* v. *Megguire*, 2 Greenl. 176; *Gookin* v. *Whitten*, 4 Greenl. 16; *Henry* v. *Bell*, 5 Vt. R. 393; *Ganson* v. *Hobart et al.*, 2 *Sumner's* R. 401, 8, 9; *Jackson* v. *Waford*, 7 Wend. 62; *Kinsell et al.* v. *Daggett et al.*, 2 Fairfield, 309; 5 Cowen, 74; 16 John. R. 293.

But again: Suppose we should treat Lacy and Edward Little as tenants in common of lots No. 1 and 2, from 1811 to 1815, what consequences would follow? We admit the presumption is, that the possession of one tenant in common is in support of the common title of all. But it is well settled, both by the English and American cases, that this presumption may be repelled, and an adverse possession established by proof of an open claim of exclusive right. Such proof, we have in this case. Josiah Little, senior's, entry and open claim of exclusive right, under his deed from Edward Little, in 1815, was an ouster of Lacy. *Johnson* v. *Brink*, 4 Cow. R. 483; *La Leombois* v. *Jackson*, 8 Cow. R. 589; *Jackson* v. *Tibbits*, 9 Cow. R. 241, 252, 253; id. 530; 2 B. Munroe's R. 434, 435.

But another view: The orators cannot, even in equity, be treated as the assignees of the Lacy mortgage as to lots No. 1 and 2, because the mortgage to their intestate, Elias Lyman, was void as to those lots, on the ground of an actual *adverse* possession of them by Josiah Little, senior, when it

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was executed and delivered. If Elias Lyman acquired no lien on lots No. 1 and 2, by his mortgage from Erastus Chamberlain, the payment of the Lacy mortgage would give him none. The lien created upon the land by the subsequent mortgage, is the sole ground upon which a court of equity treat the second mortgagee as the assignee of the first mortgage, when he pays it off for the purpose of availing himself of his own mortgage. The legal title to lots No. 1 and 2, is either in thed efendant Little, or in Raymond Chamberlain and the heirs of Joseph Chamberlain; and, as to this question, it is immaterial which.

The decree, and proceedings in chancery, had by Lacy against Raymond and Erastus Chamberlain, for the purpose of foreclosing his mortgage, can have no bearing upon the question now before the court, for the following reasons,—1. Because they have not been duly certified and filed as exhibits in the case. It is well settled that a document which is stated in the bill, and which the answer admits and refers to, cannot be read from the bill at the hearing, but must be produced. *Cox* v. *Allingham*, Jacob, 339; 3 Eq. Dig. p. 265, pl. 8. 2. Because the defendants, in this case, were not parties to the proceedings in that case. 2 Sumner's R. 401, 407. 3. Because, the decree in that case does not profess to settle the right of the defendant, Little, to the lots in question.

But, if Little had been a party to Lacy's bill, no decree could have been procured against his title to lots No. 1 and 2. This is the first opportunity he has had to resist Lacy's claim to the lots in question; and he may now do it, 1st. by relying on his own *adverse* possession for more than fifteen years next before the filing of this or Lacy's bill; 2. by insisting upon the lapse of time, as furnishing sufficient evidence of the payment and extinguishment of the debt, described in the condition of Lacy's mortgage deed; 3. by relying upon the lapse of time, and his own open and exclusive possession of both lots, for more than 20 years, as evidence from which the court will presume a conveyance or release from Lacy to him of lots No. 1 and 2;—and finally, by relying upon the statute of limitations. Starkie's Ev. 977; *Chapman* v. *Chapman*, 1 Mumford, 398; *Dorsey* v. *Gassaway*, 2 Harris and John. 409; *Chase* v. *Hathaway*, 14 Mass. 222;

Am. Ch. Dig. 103. pl. 2 & 3; *Lansing* v. *Starr*, 2 Johns. Ch. R. 150; *Demarest* v. *Wynkoop*, 3 do. 136; *Moore* v. *Cable*, 1 do. 385; *Giles* v. *Barremore*, 5do. 445, 452; *Moores* v. *White*, 6 do. 369; *Kane* v. *Bloodgood*, 7 do. 90; *U. V. M.* v. *Reynolds* 3 Vt. R. 542 and cases cited; *Briggs* v. *Prosser*, 14 Wend. 227; *Jackson* v. *Waford*, 7 Wend. 62; 3 Cruise Dig. 318. pl. 21; do. 333, pl. 64; Matthews on Pre. Ev. 196, and cases cited; 1 Sumner's R. 110; *Pratt* v. *Valtia*, U. S. Con. R. January, 1835, 407; *Gates et ux.* v. *Jacob et al.*, 1 B. Munroe's R. 308, 631–2; 2 B. Munroe's R. 282–3–4; 1 Sch. and Lef. 413, 428–9; 2 do. 607.

The statement in Josiah Little's answer, that, in 1829, he and his father considered the lands then quit-claimed to Erastus Chamberlain, incumbered to their value by the Lacy and Lyman mortgages, cannot have the effect to rebut the presumption, arising from the lapse of time, of the payment of the note described in the condition of Lacy's mortgage deed. Nothing short of the admission of the mortgagor himself would remove and overcome that presumption. But again, the statement does not admit the note secured by the mortgage to be due; at most, it was only an admission that the mortgage was undischarged, upon the record and appeared to be an incumbrance upon the land quit-claimed. The statement in question must be taken in connection with the other parts of the answer; and, when so taken, it amounts to nothing like an admission that the Lacy mortgage was an incumbrance on the land claimed by Little. Angell on Lim. 119 to 122.

Thus far, we have proceeded upon the ground that the orators are entitled to no relief whatever against the defendant, Little. But should the court consider the orators entitled to *some* relief, the question will arise, what shall it be?

The special relief asked most certainly cannot be granted, for Little claims only a small part of the lands covered by the Lacy mortgage, viz: one half of No. 2, and one eighth of No. 1. The injustice of compelling him to pay the whole amount of the Lacy mortgage must be apparent. The orators, however, claim, under the general prayer in their bill, *contribution*. They insist that Little should pay such a proportion of the Lacy mortgage as the value of the land he claims, bears to the value of the whole land covered by the

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mortgage. We contend that no such relief can be granted— 1st. Because the frame of the bill will not allow of it. 2d. Because the facts disclosed show that Little ought not in equity to pay any part of the Lacy mortgage. *Gill* v. *Lyon*, 1 Johns. Ch. R. 447; *Clowes* v. *Dickenson*, 5 Johns. Ch. R. 235–40; *Allen* v. *Clark*, 17 Pick. 47, 55.

It is clear that Little cannot be called upon for contribution, unless it appear that the lands covered by the Lacy mortgage, to which Little lays no claim, are insufficient in value to pay the debt secured by the mortgage; and no such thing is alleged or pretended. *Gill* v. *Lyon*, 1 Johns. Ch. R. 447; 5 do. 235–40; 17 Pick. R. 47, 55.

II. As to the right of the orators, under the mortgage from Erastus Chamberlin to Elias Lyman, their intestate. This mortgage we insist is void as to the lots No. 1 and 2, on the ground of an actual *adverse* possession of them by Josiah Little, senior, at the time of its execution and delivery. Statute, 171. The orators, however, contend that the statute upon which we rely does not apply to a mortgage deed or any equitable title. We think it does apply to all titles; but it is unnecessary to discuss that question, because Erastus Chamberlin, the mortgagor, derived his title to the lands mortgaged from Raymond Chamberlin, by deed dated July 5, 1815, and from the heirs of Joseph Chamberlin, by deed, dated February 20, 1816, both of which deeds were void, as to lots No. 1 and 2, upon the ground of an actual adverse possession of them by Josiah Little, senior, at the time they were executed. 8 Pick. 272.

At the time Raymond Chamberlin conveyed to Erastus, in 1815, he had no equitable title to any part of either of the lots in question. He had exchanged his interest in them for an interest in No. 9 and 10. Again, the open, visible and exclusive possession of lots No. 1 and 2, by Josiah Little, senior, from 1815 to 1827, was sufficient to put both Erastus Chamberlin and Elias Lyman on inquiry as to his, Little's, title, and sufficient notice to them that he claimed to own both lots. *Kent* v. *Plummer*, 7 Greenl. 464; *Norcross* v. *Widgery*, 2 Mass. 506; 3 do. Suppt. 596; *Farnsworth* v. *Child*, 4 Mass. 434; *Rublee* v. *Mead*, 2 Vt. R. 544.

III. As to lot No. 10, and three fourths of lot No. 9. It is alleged that Erastus Chamberlin intended to have includ-

ed them in his mortgage deed to Lyman, but that, by mistake, they were omitted. If this were true it would not avail the complainants, because the mistake of one party is no ground for relief in a court of equity. But the pretended mistake is denied by the answers, and no proof has been taken to sustain the allegation. *Wilkinson* v. *Scott*, 17 Mass. 249, and cases cited.

Erastus Chamberlin, having the possession and legal title to lot No. 10, and three fourths of lot No. 9, in 1826, sold and conveyed his interest in them to Josiah Little, senior, and the bill and answers show that Little had a legal title to them at the time of his decease in 1830. It also appears, that, in 1832, the heirs of Josiah Little, senior, conveyed the lots to Anna Atkinson. The complainants therefore, can sustain no claim to either of these lots upon the principle of *substitution*, or any other known to the law. Besides, the bill is not framed for relief, on the principle of *substitution*.

L. B. Peck, for orators.

I. As to the orators' rights under the *Lacy* mortgage.

1. The orators stand as the assignees of the Lacy mortgage, and have a right to enforce it against the defendant, Little. The latter cannot rely on the lapse of time as a bar, and insist that it is to be presumed the mortgage debt was extinguished prior to the decree. Although he was not a party to that suit, still, he is bound by the decree, and cannot go back of it, inasmuch as he claims under the mortgagor, and, consequently, is in by privity of estate. *Lady Dartmouth* v. *Roberts*, 16 East, 334; 1 Phil. Ev. 246, 284–5; Grisley's Ev. 319, 323; *Adams* v. *Barney*, 17 Mass. R. 365; 1 Stark. Ev. 192–3–4–5; 1 Story's Com.; 1 P. Wms.; 9 Wheaton, 489.

The foreclosure on the *Lacy* mortgage was a proceeding *in rem*, (*Kenshaw* v. *Thompson*, 4 Johns. Ch. R. 609) and the general rule is, that, in such case, the decree is binding on the whole world, and it is, at all events, conclusive on all persons claiming under either party.

Suppose the decree had been against *Lacy* on the ground that it was to be presumed the mortgage was extinguished; this would have been a bar to any other proceeding to enforce the mortgage, either against the Chamberlins or Little,

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by Lacy or his assignee. This is the doctrine of the case, *Adams* v. *Barney*. The converse of the principle must also hold, and Little is bound by the decree. Had Lacy, at any time within fifteen years before the commencement of this suit, recovered a judgment at law on the note against the maker, this would have estopped Little from insisting that the note must be presumed to have been paid; and the decree has the same effect. Again: Both R. and E. Chamberlin, in their answers, admitted the existence of facts which defeated the presumptive bar; and those answers are evidence against Little. The respondents, in their answers to the present suit, admit that, in 1829, both of the Littles regarded and treated the mortgages to Lacy and Lyman as outstanding and unpaid; and they ought not now to be permitted to set up the statute. *Jackson* v. *Price*, 10 Johns. R. 414; *Hansaid* v. *Handy*, 18 Ves. 455; *Smart* v. *Hunt*, 4 Ves. 478, (note); *Hardy* v. *Reeves*, id. 466.

2. If the orators have not a right to call on the defendant, Little, to pay the whole sum due on the *Lacy* mortgage, they have a clear equity against him for a reasonable contribution. *Taylor et al.* v. *Porter*, 7 Mass. R. 355; *Sawyer* v. *Lyon*, 10 Johns. R. 32; *Gibson* v. *Crehore*, 5 Pick. 152; *Parkman* v. *Welch*, 19 Pick. 238; 1 Story on Eq. 461–2; 9 Conn.; 9 Wheaton; *Harris* v. *Ingledon*, 1 P. Wms. 98, 99; *Sir Wm. Harbart's case*, 3 Co. 14; *Taylor* v. *Bassett*, 3 N. H. R. 294.

3. Neither the possession of Edward Little or Josiah Little, senior, was adverse to Lacy. They claimed under the mortgagor, having constructive and actual notice of the existence of the Lacy mortgage, at the time their respective rights accrued. The defendant, Little, then, stands in the shoes of the mortgagor, and can avail himself only of such defence as would, under the same circumstances, afford a protection to the latter. The possession of the mortgagor, and those claiming under him, is never regarded as adverse to the rights of the mortgagee. R. Chamberlin could not insist on an adverse possession had he continued in possession; and it is equally clear that Little's possession was not adverse. *Higgins* v. *Muir*, 4 Cranch, 419; *Hughes* v. *Edwards*, 9 Wheaton, 489; *Jackson* v. *Jackson*, 5 Conn. 173; *Thayer* v. *Vrami*, 1 McCord's Ch. R. 395–7, (cited 2 Am. Eq. Dig.

327, pl. 20); *Fitchburgh Man. Co.* v. *Melom*, 15 Mass. R. 270; *Wilder* v. *Houghton*, 1 Pick. 90; *Hunt* v. *Hunt*, 14 Pick. 374; *Tucker* v. *Keeler*, 4 Vt. R. 161; *Reed* v. *Sheple*, 6 Vt. R. 602; 4 Kent's Comm. 151; *Newman* v. *Chapman*, 2 Rand's R. 93, cited in *Adam's Ejectment*, 31 (n.); *Noyes* v. *Sturdevant*, 18 Maine R. 104; *Ellithorp* v. *Dewing*, 1 D. Chip. R. 141; *Cholmondely* v. *Clinton et al.*, 2 Merivale, 359.

So if a tenant at will execute a lease and give possession of the premises to his lessee, the owner of the land is not thereby disseized. *Jackson* v. *Rogers*, 1 Johns. Cases, 33. Nor is his conveyance, in fee, a disseizin, unless at the election of his landlord. *Jackson* v. *Davis*, 5 Conn. R. 134. And even the holding over of a tenant for life, after the determination of his estate, though he claims in fee, is not a disseizin of the rightful owner. *Varrick et al.* v. *Jackson*, 2 Wend. R. 166; *Lyon* v. *Burtiss*, 20 Johns. R. 491.

II. As to the rights under the *Lyman* mortgage.

1. The payment of interest on the note, within fifteen years, evidenced by the endorsements thereon, the admissions of E. Chamberlin that the debt is due, and the recognition of the existence of the debt by the Littles, when they quit-claimed to E. Chamberlin in 1829, clearly take the case out of the statute of limitations.

2. The possession by the Littles of lots 1 and 2 was not adverse, so as to avoid the mortgage, for three reasons. 1. Both parties claim under R. Chamberlin, and, consequently under the same title. *Jackson* v. *Bard*, 4 Johns. R. 230; *Williams* v. *Thomas*, 12 East, 153. 2. The exchange of lands, in 1811, under which Little claims, is *void* by our statute of frauds, and does not lay the foundation for an adverse possession. An act or deed which is void cannot be the foundation of an adverse possession, for it can give no color of title. *Doe* v. *Turner*, 9 Wheat. R. 541; *Powell* v. *Harman*, 2 Pet. R. 241; *Jackson* v. *Delano*, 13 Johns. R. 552; *Holyoke* v. *Haskins*, 5 Pick. 20, 27; *Dufour* v. *Camfraw*, 11 Martin's R. 715; *Frique* v. *Hopkins*, 4 id. U. S. 224; *La Frambais* v. *Jackson*, 8 Cow. 589, 605; *Jackson* v. *Vosburgh*, 9 Johns. R. 270; Tilling. Adam's on Eject. Appendix, 464–5–6–7–8; *Beach* v. *Catlin*, 4 Day's R. 284. Edward Little was a mere tenant at will to R. Chamberlin and those claiming

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under him, and the conveyance to, and entry of J. Little, senior, was not a disseizin of those holding the *legal* title from R. and J. Chamberlin. At the date of the mortgage, this title had vested in E. Chamberlin, who had an undoubted right to execute the deed, as Little must be regarded as his tenant holding at sufferance. *Jackson* v. *Rogers*, 1 Johns. Cases, 33. 3. A mortgage is not a conveyance within the statute against selling pretended titles. *Leonard* v. *Bosworth*, 4 Conn. R. 421; *Green* v. *Scovil*, 4 Day, 234; 4 Kent's Com. 449; *Allen* v. *Smith*, 1 Leigh's Eng. R. 231; *Converse* v. *Searls*, 10 Vt. 578. If a mortgage is not within this statute, the mortgage to the intestate was *valid*, and passed the interest Raymond Chamberlin had in lots 1 and 2. If it be said that the conveyances from Raymond to *Erastus* were void as to these lots, on the ground of an adverse possession, we answer, that the first conveyance was, in effect, a mortgage of his, Raymond's, *equity of redemption*, to secure Erastus for the payment of the Olcutt and Lyman debt, and his subsequent conveyance was a mere release of his right to redeem.

3. The testator was a *bona fide* purchaser, without notice of Little's equitable title. The deed of 1815 from Edward Little to his father, J. Little, senior, does not cover lot No. 2, nor that part of No. 1 conveyed by the mortgage. The deed of 1817, between the same parties, was not recorded till 1821, and even notice of this deed would not afford notice of the grantee's claim, as it contained no particular description of any land. Nor did the possession of Little affect the testator, as it does not appear that the testator had any knowledge of it. Had knowledge of this fact been brought home to him, he would have been bound by any equitable title existing in the former.

4. If lots, Nos. 1 and 2 are not bound by the mortgage, then we insist that the plaintiffs have an equitable lien on 9 and 10, on the ground of substitution. These lots were received in exchange for, and stand in the place of, 1 and 2. These lots would be bound by this equity in the hands of E. Chamberlin; and Little, senior, claiming under and through the exchange, having full knowledge of all the circumstances, is also bound by the equity, which is to be regarded as running with the land. The lots are equally affected by the

lien in the hands of Atkinson, as he holds in the right of his wife, who claims as heir to J. Little, senior. *Hamilton* v. *Royce*, 2 Scho. & Lef. 315; *Harvey* v. *Ashley*, cited in 2 Scho. & Lef. 328; 2 Sugden's Vendors, 341; in the matter of *Howe* and *Wife*, 1 Paige, 125; *White* v. *Knapp et al.* 8 Paige, 173.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The object of this bill is to foreclose a mortgage, executed by Erastus Chamberlin to the orators and, also, to compel the defendants to pay the sum due on a mortgage executed by Raymond Chamberlin to Ephraim Lacy, which the orators have been compelled to pay. Or if the mortgage, executed by Erastus Chamberlin, does not include certain lots, No. 1 and 2, — that the mortgage may be considered and decreed as a lien on Nos. 9 and 10, which were received by Little in exchange for Nos. 1 & 2, because Nos. 1 and 2 were inserted, by mistake, instead of Nos. 9 and 10.

It appears that, in September, 1806, Raymond Chamberlin executed a mortgage deed to Ephraim Lacy, of a part of lots No. 1, 2 and 9, with other lands; that, in 1811, Raymond Chamberlin exchanged with Edward Little, and put him into possession of Nos. 1 and 2, and received in exchange therefor, that part of No. 9 of which he was not then the owner, and, also, No. 10. In 1815, Raymond deeded to Erastus, and in 1818, Erastus mortgaged to the orators.

If the orators are entitled to foreclose this mortgage against the defendant, Little, it must be on the ground that Little is assignee of the mortgagor, Erastus Chamberlin; for if Little holds by an elder, or independent, or adverse title, the orator cannot make him a party to a bill of foreclosure, as he could be under no legal or equitable obligation to pay that mortgage. The defendant, Little, is not assignee of the mortgagor, Erastus Chamberlin, in consequence of any deeds executed by Erastus to Little. The only deed from Erastus, in evidence, is the one executed by him to Little in 1826, and, as all the land described in Erastus' mortgage to the orator, which was included in the deed of Erastus to Little, in 1826, was reconveyed by Little to Erastus in 1829, the

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defendant, Little, cannot be said to hold under the mortgagor, Erastus, in consequence of any deed of conveyance.

The title of the defendant, Little, is wholly adverse to that of the orators under the mortgage from Erastus. In 1811, Edward Little made the exchange with Raymond Chamberlin, by virtue of which, Little went into possession, claiming these lots as his own. In May, 1815, E. Little conveyed to Josiah Little; and though it may be doubtful whether the deed, then executed by Edward Little, contained and conveyed the lands in question, yet we learn, from the testimony, that it was intended to convey these lots, and that Josiah Little immediately went into possession, claiming them as his own. Little being thus in possession, the deeds from Raymond and the heirs of Joseph Chamberlin, to Erastus, executed in July 1815, and in 1816, were inoperative and void by force of the statute of 1807, against purchasing lands of which another is in adverse possession; and this effect is not obviated by the claim set up in the bill, that the deed from Raymond to Erastus was intended as a mortgage. The deed is absolute in its terms, and there is no proof that it was otherwise intended. Nor is this effect obviated by the fact that the exchange, made in 1811, was by parol. As possession immediately accompanied the exchange, and the parties entered into possession, claiming ownership, their respective possessions, for fifteen years, would have ripened into a perfect title.

The possession of Little being, then, adverse, no part of these lots, Nos. 1 and 2 passed to Erastus, or could pass by his mortgage deed to the orators. The orators are, therefore, not entitled, on the ground of the mortgage to Lyman, to any decree against the defendant, Little, for Nos. 1 and 2. The fourth part of No. 9 was released to them by Erastus, in 1836, and is not now in controversy.

The next question is, whether the mortgage of the orator should be corrected, so as to embrace Nos. 9 and 10, which were received, instead of Nos. 1 and 2.

The answer to this is, there is no evidence, whatever, of any such mistake; and equity will not correct a mistake in a written instrument, except on clear and undoubted testimony. On no ground, whatever, can the orators have any claim against the defendants, Little or Atkinson, on the

mortgage executed to their intestate by Erastus Chamberlin.

On the mortgage executed by Raymond Chamberlin to Lacy, called the Lacy mortgage, the equitable claim of the orators stands on different grounds. This mortgage was an incumbrance on Nos. 1 and 2, owned by Little, as well as on the other lands contained and described in the deed of mortgage from Erastus Chamberlin to the orators; and if either were compelled to pay the same, they could call on the other for remuneration of an equitable portion of the money thus paid for their common benefit. The orators have been compelled to pay the whole amount of the mortgage incumbrance, and thereby have relieved the lands of the defendant from the incumbrance created by that mortgage, and what existed at the time of the parol exchange made between Edward Little and Raymond Chamberlin. According to the principle on which the court made the decree in the case of *Payne* v. *Hathaway*, 3 Vt. 212, the defendant should pay his proportion, unless he has shown a good reason for not doing so, by his answer, and the testimony. The statute against purchasing lands when there is an adverse possession does not apply. But the defendants insist upon the statute of limitations, and upon the presumption arising from his possession for fifteen years. Both of these defences are removed by the admission made by him, in his answer, that, in August, 1829, this mortgage was then an outstanding and existing incumbrance, which is equivalent to an admission that it was not paid, and, also, by the decree of foreclosure obtained by Lacy at the March term of this court, 1835, against Raymond Chamberlin, as well as against the orators. The debt to Lacy being thus unpaid, as appears by the admissions of Raymond Chamberlin, as proved by the decree, as well as by the admission of the defendant in August, 1829, neither the statute of limitations, nor the presumption arising from possession, could have prevented Lacy from obtaining the decree against the defendants, if they had been made parties to that bill, nor do they stand in the way of the orators' claim in this bill.

It is objected that the decree made in the suit of Lacy against the orators, is not evidence, in this case, inasmuch as it has not been filed as an exhibit. It being stated in the

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present bill, and admitted in the answer, without any reference to the decree or proceedings, it is to be considered as proved and in evidence, so far as it is stated and admitted. Had it been only admitted in the answer *and referred to*, as was the written document in the case of *Cox* v. *Allingham*, 1 Jacob, 339, the orators should have filed the record as an exhibit.

It is, however, urged that the orators cannot be treated as assignees of the Lacy mortgage, inasmuch as their mortgage did not contain Nos. 1 and 2, in consequence of the adverse possession of the defendant. The orators are not considered as the assignees of the mortgage as to those lots, for if they were such, they would be entitled to a foreclosure against the defendant for the whole sum of the Lacy mortgage. But it is on the ground that they have no claim to those lots, but have been compelled, in order to relieve their other lands from that incumbrance, to pay that mortgage, and thereby relieve the defendant from that incumbrance. We are, therefore, of opinion, that, for the proportion of the money paid by the orators on the decree obtained by Lacy, in March 1835, the orators have a decree against the defendant; and this proportion was correctly ascertained and settled by the chancellor, and that the orators are entitled to relief under this bill, wherein they pray for a foreclosure of the Lacy mortgage, and also for such other relief as the facts or proof would warrant. The cost on the Lacy mortgage should be borne proportionably by the orators and defendant, as it was money which the orators were compelled to pay on an incumbrance on the lands therein described; and the orators were in no fault, because Lacy did not make the defendants parties to his bill. The security of Lacy being sufficient, without resorting to the defendants, he probably did not wish to involve himself in the controversy which has embarrassed these contending parties.

Upon the subject of dismissing Atkinson, with costs, we would observe that costs are so much within the discretion of the chancellor, that this court will rarely, if ever, alter or disturb a decree made by him, as to costs. We, however, see no reason why this discretion was not properly exercised in this case.

The decree of the chancellor is, therefore, affirmed, except

that, as the time for the payment has elapsed it will be necessary to extend it to the 1st of August next; and the chancellor will be directed to alter the decree accordingly.

DAVID JOHNSON *v.* HARRISON BAYLEY.

(In Chancery.)

The charter of the town of Newbury, granted by the governor of New-York to Jacob Bayley and others, was in confirmation of a grant of said town previously made by the governor of New-Hampshire, and said Bayley held the township, so granted, in trust for the proprietors named in the charter from the governor of New-Hampshire.

Where a grantee under the New-Hampshire charter had always claimed a particular right, — paid all the taxes thereon, but had never taken possession of a wild lot belonging to such right, he was treated as the owner of such lot and said Bayley as holding in trust for him, and where the administrator of said Bayley had sold and deeded the lot to the defendant, after a lapse of over sixty years from the time of said grant, the defendant was decreed to convey the lot to the orator, who was the owner thereof under a proprietor named in the N. H. charter, and had always paid the taxes thereon.

THIS was an appeal from a decree of the court of chancery, that the defendant execute and deliver to the orator a deed of quit claim, of a lot of land in Newbury, containing one hundred acres, being lot No. 55.

The orator, in his bill, set forth and charged, among other things, in substance, that on the 18th day of May, 1763, the governor of New-Hampshire granted a charter of the town of Newbury, in the county of Orange, to Jacob Bayley, John Hugh and certain other persons therein named; that, immediately afterwards, viz., in 1763, the said grantees took possession of said town, caused the same to be surveyed, and divided the lands therein among said grantees; that, in this division, lot No. 55, containing one hundred acres, was drawn and set to the right of John Hugh; that in consequence of the order in council of the government of Great Britain, made on the 20th of July, 1764, and of the controversy between New-York and New-Hampshire, relative to the division line between those (then) provinces, the proprietors of Newbury, at a regular meeting, held in 1771, by

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vote, authorized and appointed the said Bayley to proceed to New-York and procure for them a charter from the governor of that province, confirming to them the charter so granted by the governor of New-Hampshire; that, in pursuance of said vote, the said Bayley proceeded to New-York, and, by petition in writing, represented to the governor of New-York that the governor of New-Hampshire had granted to him and the other proprietors of Newbury, a charter of said town, &c., and that said proprietors had authorized him to obtain, in trust for them, a charter of said town from the governor of New-York for the purpose of quieting their title to said town, that, thereupon, the governor of New-York granted a charter of said town to the said Bayley and twenty-four other individuals therein named, dated March 19, 1792, as a confirmation grant to said proprietors; that on the 21st day of March, 1792, the twenty-four grantees, named with the said Bayley, in said last mentioned charter, released and conveyed, to said Bayley, all their right, title and interest to the lands in said Newbury, under said last mentioned charter; that said charter from the governor of New-York, and said release from said grantees to said Bayley were made to him in trust for the proprietors and owners of said land under the New-Hampshire charter, and were so received and accepted by said Bayley; that said Bayley, when requested, quit claimed, from time to time, to the owners of land in said town, under the New-Hampshire charter, the tracts of land severally owned by them, without demanding any consideration for such conveyances; that no proceedings were ever had, nor survey made under the New-York charter, but the same was always regarded by said proprietors as a confirmation of the grant previously made by the governor of New-Hampshire, and that said Bayley never set up any claim or title to any of said lands, under the New-York charter, or under said release from the other grantees to him, but always treated his title under the New-York charter as one held in trust for the benefit of the proprietors and purchasers under the New-Hampshire grant.

And the orator further set forth and charged, that the said John Hugh and Anna, his wife, on the third day of March, 1770, for the consideration of one hundred and forty pounds by their deed of that date, duly executed, conveyed said lot,

No. 55, with other lands, to one Samuel Hale; that said Hale, on the 20th of December, 1779, for the consideration of thirty pounds, by his deed of that date, duly executed, conveyed said lot No. 55, to Thomas Johnson, the father of the orator; that the said Thomas, by his last will and testament, devised said lot, No. 55, to the orator and other devisees, and that after the death of said Thomas, his said will was duly proved and allowed in the probate court for the district of Bradford, to wit, on the 20th of February, 1819, and that the other devisees of said Thomas afterwards conveyed all their interest in said lot, No. 55, to the orator; that said Bayley died, in the year 1815, poor; that no administration was taken of his estate until the 27th day of September, 1832, on which day administration thereof was granted to Tappan Stevens, by the probate court for the district of Bradford, who, on the same 27th day of September, 1832, obtained license fom said probate court to sell all the real estate of the said Jacob Bayley; that the defendant, prior to the 14th day of February, 1842, frequently applied to said Stevens to convey to him said lot No. 55, but the said Stevens from time to time declined making such conveyance, and assigned as a reason therefor, that said lot equitably belonged to the orator, and that he, Stevens, had no right to sell the same; that on the day and year last, aforesaid, the said Stevens, as such administrator, conveyed said lot, No. 55, to the defendant, by deed of quit claim, for which deed, the defendant gave his note for fifty dollars, which remained unpaid; — that the orator had commenced an action of ejectment, against the defendant, to recover the seizin and possession of said lot, No. 55, which was still pending in the Orange county court, and praying that the defendant might be enjoined from setting up any title to said lot, in said action, and that he be decreed to convey said lot No. 55, to the orator, and for further relief.

The defendant, in his answer, denied the equity of the orator's claim, and that Jacob Bayley held said lands under the charter from the governor of New-York, in trust for the grantees and proprietors under the charter from the governor of New-Hampshire. He also denied all knowledge of the orator's claim as *cestui que trust*, but admitted that he knew the orator claimed the lot in question, and supposed that

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claim to be fonnded on the orator's possession. The points of defence, stated and relied upon in the answer, sufficiently appear from the opinion of the court.

The answer was traversed, and testimony taken. The facts found by the court, are, also, fully stated in the opinion. Among the witnesses who testified was Isaac Bayley, a son of Jacob Bayley, the latter being known as general Bayley.

W. Upham and *E. Farr* for defendant,

1. We contend, that the orators have no title to the lot of land in question, either in law or equity. The legal title is admitted to be in the defendant, and the equitable title is presumed to be there also, unless clearly proved to be elsewhere.

2. That there was no trust on the part of Jacob Bayley, created by the New York charter, within the power of a court of equity to enforce. He procured the charter at his own expense. No funds were furnished him by the persons who claimed to be the proprietors of Newbury, under the New Hampshire charter. No trust appears on the face of the charter, and no writing was executed by Bayley creating or declaring one. But it is claimed by the orator, that there was a resulting trust, arising by operation of law, on the part of Jacob Bayley, and this court ought to compel an execution of it. We admit the doctrine of resulting trusts; but insist that nothing was done by the proprietors, and land owners of Newbury, from which such a trust could arise in this case. 4 Kent's Com. 3 ed. 305–6; 1 Cruise's Dig. 311, pl. 41; *Lloyd* v. *Spittet*, 2 Atk. 150.

In *Peebles* v. *Reading*, 8 Serg. & Rawle. 484, Duncan, J. said, "if a man employs another, by parol, as his agent, to buy an estate for him, and the agent buys, and pays for it with his own money, and takes the conveyance in his own name, it would not be a resulting trust." 2 Sugden, 317–18 & n. In the case at bar, it should be remembered, Samuel Hale claimed to be the owner of the lot in question, by virtue of a quit claim deed, from John and Anna Hugh, at the time Jacob Bayley obtained the New York charter. The orator, therefore, in order to sustain his bill, must satisfy the court that Jacob Bayley, in his life time, held the lot in question, in trust for Hale. This we think, cannot be done—for

Hale was not one of the proprietors of Newbury, under the New Hampshire charter, and no part of the cost of the New York charter, was sustained by him. *Steere* v. *Steere*, 5 Johns. Ch. R. 1; *Botsford* v. *Burr*, 2 Johns. Ch. R. 409.

3. If any trust was created by the New York charter, on the part of Jacob Bayley, it was, we insist, conditional; that is to say, he was only under obligation to convey to such of the proprietors and land owners of Newbury, as should apply to him within a reasonable time for deeds, and pay their proportions of the expenses incured by him in procuring the charter. A trustee, acting in good faith, is always entitled to a prompt indemnity for his necessary disbursements and expenses, and has a lien on the trust property for them. *Murray* v. *De Rottenham*, 6 Johns. Ch. R. 62; and it makes no difference whether they were stipulated for or not. *McMiller* v. *Scott*, 1 Monroe's R. 151; 2 Eq. Dig. 505, pl. 32, 33; *Shaver* v. *Radley*, 4 Johns. Ch. R. 319.

4. From the lapse of time, and the death of all the original parties, the court will presume a discharge and extinguishment of the trust, if one existed. Jacob Bayley lived in Newbury forty three years after he procured the New York charter, and no person, claiming to own the lot in question, applied to him for a deed of it. The presumption, therefore, is irresistable, that Bayley was discharged from his trust, or that the pretended owner of the lot abandoned it, rather than apply for a deed and pay his proportion of the expense of the charter.

It is too late, we think, after the lapse of seventy years, to call for the execution of a trust resting in parol. *Prevost* v. *Gratz*, 6 Wheat. 481; *Hillary* v. *Waller*, 12 Ves. 261 266.

5. If Jacob Bayley held the lot in trust, the court will not compel the defendent, Harrison Bayley, to execute it, because he had no notice of it at the time of his purchase. It is well settled, we apprehend, that the purchaser of the legal title cannot be affected by any latent equity, of which he has not actual notice, or which does not appear on some deed necessary to the deduction of his title.

Notice of the pretended trust is denied by the defendants answer, and no proof has been taken to contradict it.

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Actual notice of trust must be proved; vague reports will not be sufficient, 2 Sugden, 315, 316. 1 Story's Eq. 75, 119, 120, 372, 396, 399. Nor will a general claim of title be sufficient to affect a person with notice of a deed, of which he does not appear to have had knowledge. 2 Sugden, 316, 339; *Jolland* v. *Stainbridge*, 3 Ves. Jr. 478. So in the case at bar, notice to the defendant, that the orator claimed the lot in question, by possession, was not sufficient to affect him with notice of the trust charged in the bill, of which it appears he had no knowledge. 2 Sugden, 295.

But it is said, the defendant cannot claim as a *bona fide* purchaser without notice of the trust, because he paid only $50 for the lot and that in his own note which is now outstanding against him. In answer to this objection we say, 1. that the question is not whether the consideration is adequate, but whether it be valuable. For if it be valuable, inadequacy is no objection to it. 2. That a negotiable promissory note, given for the purchase money of property, is, in this state, payment. *Hutchins* v. *Olcutt*, 4 Vt. R. 549. The reason why it should be alleged, in the place of *bona fide* purchase, that the consideration money has been paid, is, that the purpurchase is incomplete until it is paid, and the purchaser will be relieved against the payment. 2 Sugden, 357.

6. If the orator has failed to make out the trust charged in his bill, and notice of it to the defendant, before his purchase, he cannot expect a decree in his favor; for the other charges in his bill, if true, are not sufficient to sustain a decree for any relief whatever.

7. But we say the equitable interest was in Jacob Bayley, for the N. H. Charter was void and gave no interest in law or equity, of itself, and the settlements were made with this knowledge. And if an equity existed among the N. H. grantees as between themselves for the actual improvements made on their particular lots, and for the expenses of the charter, and for roads, &c. it was not by virtue of the charter, as such, but because labor deserves its reward. And it was only for the amount of those improvements and that expense.

A. Underwood, *J. Berry*, and *L. B. Peck*, for orator.

The New-York charter recites that it was petitioned for

by Jacob Bayley, in behalf of himself and the proprietors and inhabitants of Newbury, and the testimony, written and oral, shows conclusively that that charter was in trust for the grantees and proprietors under the New-Hampshire grant.

Another important fact should not be lost sight of. The orator and his father have, for the last half century, paid the taxes assessed upon the lot, while there is no evidence tending to show that Jacob Bayley ever set up any claim to it.

The fact that Jacob Bayley took the charter, *in trust*, being established, the question then arises, would not this court compel him, were he now living, to execute the trust? If it should be insisted that the case is within the statute of frauds, or that all relief is barred by the lapse of time, it is a sufficient answer that no such ground of defence is taken by the answer.

But were this difficulty removed, neither of these objections could be sustained.

1. The trust is not within the statute, as it arises from the situation of the parties. Bayley was the agent of the New-Hampshire claimants in the matter, and it would have been a fraud on them, if he had taken and held the conveyance in his own right. This a court of equity would not permit him to do, and it is what he never claimed to do. The trust most clearly arises by implication of law, or in other words, it is a resulting trust. *Geddings* v. *Eastman*, 5 Paige 561; *Holdridge* v. *Gillespie*, 2 Johns. Ch. R. 30; *Davoue* v. *Fanning*, do. 252, 4 Kent's Com. 301; *Van Horne* v. *Fonda*, 5 Johns. Ch. R. 388, 409. But if the trust was within the statute, it is proved by writing, under Jacob Bayley's own hand, viz, the record of the vote of the proprietors authorizing him to proceed to New York and take a charter, and his petition to the governor of New York. This proof would entitle the orator to a decree, as the statute of 1797 did not require that a trust should be *created* by writing, but that it should be proved by writing. *Foster* v. *Hale*, 3 Ves. 695; *Movan* v. *Hoys*, 1 Johns. Ch. R. 342.

2. The lapse of time is no bar to the relief sought. No claim adverse to the orator's title has been set up until a very recent period, and no possession of the lot taken until defendant entered. The statute never commences running

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against a title to real estate until an adverse claim is set up, and neither courts of law nor equity presume a conveyance or surrender of title except to quiet a long continued possession. In this case, the orator has no remedy at law, and relief being, exclusively, the object of equity jurisdiction, the statute cannot be pleaded. *Carter* v. *Murray*, 20 Johns. R. 576; *Kane* v. *Bloodgood*, 7 Johns. Ch. R. 90; *Baker* v. *Whiting*, 3 Sumner, 486; *Prevost* v. *Gratz*, 6 Wheat. 481; *Elmendorf* v. *Taylor*, 10 Wheat. 168; *Cholmondely* v. *Clinton*, 2 Jac. & Walker, 1. Same case is also reported in 2 Merrivale, where it was decided by the master of the rolls.

3. Bayley's title was passed to the defendant by the administrator's deed, and he now holds the trust estate, and stands in Bayley's place. The defendant cannot protect himself from a decree for several reasons.

1. At the time and before he took his deed he had full knowledge that the orator claimed to own the lot.

2. The purchase money has not been paid. Securing it by note is not sufficient to support the defence that the defendant was a *bona fide* purchaser without notice. Nothing short of an *actual payment* will do. *Jewett* v. *Palmer*, 7 Johns. Ch. R. 65; *Frost* v. *Beekman*, 1 ib. 288; *Wormly* v. *Wormly*, 8 Wheat. 421; Beame's Pleas in Equity, 246; Sugden's Vendors, 356–8.

3. When a defendant relies on being a *bona fide* purchaser, he must state that the vendor was in possession. *Strode* v. *Blackburn*, 3 Vesey, 226; *Wallwyn* v. *Lee*, 9 ib. 30; *Daniels* v. *Davison*, 16 ib. 252; *Boom* v. *Chiles*, 10 Peter's, 211; Beame's Pleas in Equity, 244. He must also state that the vendor was seized or pretended to be seized. *The Attorney General* v. *Backhouse*, 17 Vesey, 290; Sudgden's Vendors, 353.

4. The conveyance by the administrator is a mere release. It contains no covenant that the intestate had a title. No case can be found where a purchaser under such a conveyance has been permitted to protect his purchase. The small consideration, ($50) paid for the lot by the defendant, is strong evidence tending to show that the purchase was not *bona fide*.

5. The claim set up by the defendant, that the lot in ques-

tion is chargable with its proportion of the expense of Jacob Bayley in procuring the New Hampshire charter and the confirmation charter from New-York, has no foundation. The deposition of Isaac Bayley shows that his father never claimed any thing for obtaining the New-York charter, and that the witness paid this expense. There is no evidence tending to prove that the expense of the New Hampshire charter was not paid. Gen. Bayley's declarations are not evidence on this point. These expenses were a charge on the proprietors in their corporate capacity, and after the lapse of half a century they must be presumed to have been paid.

But this defendant has nothing to say on this subject. If Gen. Bayley or his representatives do not assert a claim on this ground, the defendant is not to be heard in this matter.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The orator states in his bill, that he is the equitable owner of lot, No. 55, in Newbury; that the legal title was in Jacob Bayley at the time of his death, and that his administrator had, by his deed, conveyed this title to the defendant in violation of the trust and duty of Jacob Bayley, which devolved on his administrator.

It appears that in 1763, Benning Wentworth, then governor of New-Hampshire, and then exercising jurisdiction over the territory comprehending the town of Newbury, granted the same to seventy-five proprietors, of whom John Hugh was one; that an order of the king of Great Britain in council was made in 1764, by which the west bank of Connecticut river was to be the west line of the province of New-Hampshire, and the dividing line betwen that province and the province of New-York. It appears, further, that the proprietors, under the New-Hampshire charter, first met June 13, 1763, and held several proprietors' meetings in that, and the succeeding years; that, in May, 1765, in consequence of the king's proclamation, they voted to send agents to New-York to acknowledge their jurisdiction, and beg their protection, and at a proprietors' meeting, held November, 1771, they voted that Jacob Bayley proceed to New-York, and take a patent for them, and to act for them in other matters, as he should find for their good, and at this meeting, seven-eighths

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of the proprietors are stated to have been present. Mr. Bayley, who is called General Bayley by the proprietors, in 1772, obtained a charter from New-York, in the manner which was then customary, in which the land was granted to him and twenty-four other persons therein named, who immediately, by deed of lease and release, conveyed the whole tract to him. In this grant it is recited that he petitioned for himself and the proprietors and inhabitants, and, on the presenting the petition, it was ordered by the governor and council of New-York, that, previous to passing the grant, the grantees, or some of them, should execute a bond, conditioned to convey to the proprietors under the New-Hampshire charter, except Benning Wentworth, the several lots, shares and proportions which they were entitled to under the grant from New-Hampshire, on their paying their proportion of all fees, expense, &c. This grant, thus obtained, was a confirmation grant, as they were termed. After this, the proprietors continued to hold proprietors' meetings, until as late as 1791, and possibly afterwards. In 1788, a proprietors' meeting was called by General Bayley, as proprietors' clerk, the application for which was from persons calling themselves proprietors in the township granted by governor Wentworth. From the testimony of the son of General Bayley and others, it appears that General Bayley always deeded to the New-Hampshire proprietors, when requested; that he claimed no expenses or fees from them; they were probably paid in the manner hereafter mentioned. From the proceedings of the proprietors; the part taken in them by General Bayley; his petition to the governor of New-York, and the recital in the grant, it is abundantly manifested and proved, by writing, as well as by the testimony, that he acted as agent of the New-Hampshire proprietors, and held the land in trust for the New-Hampshire proprietors, himself among the others. The number of rights which he, as well as others, claimed to hold, appears in the proprietors' records. It is, therefore, of no importance, at this day, to inquire how many, or how few, of the New-Hampshire grantees settled in the town of Newbury, as it is manifest that the town was settled under the proprietors named in the New-Hampshire grant; the evidence of which was then well known and understood. If any of the proprietors under New-Hampshire,

abandoned their rights, and never set up any claim, or acts of ownership, lapse of time may, at this day, prevent any claim from being set up thereto. It remains, therefore, to inquire whether there has been any such abandonment of the right of John Hugh, a part of which right the orator claims.

It appears that, so far from Hugh abandoning his right, in 1770, he conveyed it to Hale; that Hale, in 1779, conveyed lot No. 55 to Thomas Johnson, the father of the orator, and, under the will of Thomas Johnson, proved in 1819, this lot became the property of the orator; that, in 1799, 1805, 1808, and several other years, Thomas Johnson paid the taxes on this lot, and all the taxes have been paid by the orator and his father, and none by the defendant, or General Bayley. It further appears by the proprietors' records, that Hugh drew lots to two rights, and one of his lots, No. 11, the grantee of Hugh conveyed to General Bayley, who had previously conveyed it to Doct. Witherspoon; General Bayley thus recognizing the very title under which the orator claims. General Bayley died poor.

A question, then, is raised whether General Bayley had not some claim on this lot, for his expenses, fees, &c. The expenses in obtaining the New-Hampshire charter appear to have been trifling, but seventeen dollars in the whole, and for the expenses of obtaining the charter from New-York, it appears that General Bayley never asserted any claim. The money for that purpose was probably raised by his sale to Doct. Witherspoon, and George Clinton, and one of the lots, set to the rights claimed by Hugh, No. 11, was sold by Bayley to Doct. Witherspoon, and, afterwards, deeded to Bayley by Hale, the owner of the right.

The inquiry then is, is there any thing disclosed, in this case as a reason why the trust should not be executed, and the defendant decreed to deed to the orator. Every thing is in favor of decreeing the conveyance and nothing opposed to it. The orator and the grantees under Hugh have ever claimed that right. All the taxes on this lot have been paid by the orator and his father. No claim, or act of ownership by Gen. Bayley, in his life time, is proved. He died poor, and no administration was taken of his estate for fifteen years. The doctrine of abandonment and lapse of time, which has been insisted on so strongly by the defendant, ap-

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plies with much greater force against the defendant than against the orator.

From the evidence in the case, in a trial at law, the jury would be directed, at this time, to presume a grant from General Bayley to the claimants under the right, according to the doctrine of the case in 4 Wend. p. 58; but, as the defendant has improperly interfered between the trustee and the *cestui que trust*, it may be proper, to put an end to litigation, to compel him to convey to the orator. Whether he will have to pay the fifty dollar note to the administrator of General Bayley, is of no importance in this case; nor can he complain, if, having bought one lawsuit, he finds himself visited with as many as may be necessary to prevent the consequences of an improper and unjustifiable interference with the claim of the orator. Nor can he call on this court to protect him from the consequence of an unprofitable purchase of a lawsuit, as such purchases are not favored in a court of equity.

The decree of the chancellor is, therefore, affirmed with additional cost.

WASHINGTON COUNTY.

MARCH TERM, 1843.

Present, Hon. CHARLES K. WILLIAMS, *Chief Justice.*
" STEPHEN ROYCE,
" ISAAC F. REDFIELD, } *Assistant Justices.*
" MILO L. BENNETT.

JOSEPH A. WING *v.* OZRO HURLBURT.

A husband is not liable to an attorney for professional services rendered his wife, in defending against a petition for divorce, preferred by him, or in procuring a bill of divorce, on her petition.

Goods, or services furnished, or rendered, after the commencement of a suit, become a part of the account; and the party furnishing or rendering, is not obliged, while the suit is pending, to receive pay for a single charge.

Where a party intends to rely on a tender, he cannot make it on a trial before an auditor, and leave the money in his hands, but must bring it into court.

THIS was an action of book account, in which there was a judgment to account, and reference to an auditor.

The auditor reported that, to the first three items of the plaintiff's account, amounting to 88 cents, there was no objection by the defendant; that the fourth charge of $1.83 accrued after the commencement of the suit, and that, at the trial before him, the said sum was tendered by the defendant to the plaintiff, which remained in his, the auditor's, hands; that the subsequent items of the account, from No. 5 to No. 29, inclusive, were for professional services rendered, and money paid out for, and at the request of, one Mary S. Hurlburt, then wife of the defendant, in defending for her, against a petition for divorce commenced against her by the defendant; and that the remaining items of the account were for like services, and disbursements at the request of said Mary S., in the prosecution of a petition for a divorce for the cause of intolerable severity, in her favor, against the defendant, made returnable at the same term of the court as

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the said petition of the defendant against the said Mary S. And the auditor reported that both of said petitions were tried by the court, together; that the petition of the said Ozro Hurlburt was dismissed, and that, by the consent of the said Ozro, a divorce was granted on the petition of said Mary S., and she was allowed alimony to the amount of $250.

The auditor, thereupon, submitted to the court, whether the defendant was liable to the plaintiff for said professional services and disbursements, and reported that, if the court should be of opinion that he was liable, he found due to the plaintiff the sum of $99.50; but if the court should be of opinion that the defendant was not thus liable, he found due the plaintiff the sum of $2.71.

Upon this report, the court rendered judgment for the plaintiff, for the whole of his account; to which decision the defendant excepted.

J. A. Vail and *W. K. Upham*, for defendants.

I. As to the first item of the plaintiff's account, objected to by defendant, (item No. 4) we say, although it was necessary for the auditor, by statute, and by the decision of the case of *Martin* v. *Fairbanks*, 7 Vt. R. 97, to audit all the accounts of the parties "to the time of making up the report," yet, this charge having accrued subsequently to the commencement of this suit, it was competent for the defendant to pay it, and the tender of this amount by the defendant to the plaintiff, at the hearing before the auditor, will avail him and amount to a payment; if not, the consequence is, there can be no dealings whatever between persons who have an action of book account pending.

II. As to the items of plaintiff's account which accrued in defending the bill of divorce instituted by defendant against his wife. From the facts found by the auditor, we contend, that the defendant is not legally liable to pay this part of the account. It is not a contract for *necessaries*, within the meaning of that term, as applied to the legal liability which results from the relation of husband and wife. The husband is bound by all contracts of the wife, for *necessaries*, made during coverture. This rule, with some exceptions, not necessary to refer to, contains the whole liability of the husband; and this, according to Mr. Reeves,

in his Domestic Relations, "rests wholly on the ground of its being a duty in him to provide *necessaries* for his wife, which the law will enforce." Ch. Kent says, "the husband is bound to provide his wife with *necessaries* suitable to her situation and his condition in life, &c., but for any thing beyond *necessaries* he is not chargeable." Blackstone lays down the same principle in almost the same language. Were the professional services of the plaintiff *necessaries*, within the true meaning of that term, as understood in the law, and used by these eminent jurists? By reference to the earlier forms of pleadings and authorities, we find this term defined. *Whittingham* v. *Hill*, 2 Croke's R. (Jac. 1) 494, and authorities there cited; *Shepard* v. *Mackoul*, 3 Camp. 327, note. By *necessaries* we understand food, drink, clothing, &c., for the support and sustenance of life. The case of *Shepard* v. *Mackoul*, above cited, can afford the plaintiff's action no support, for, in that case, the professional services of the attorney were, in the first instance, necessary for her personal safety, and were required for her "preservation and safety;" and Lord Ellenborough expressly says, "that the defendant's liability depended upon the necessity of exhibiting articles of the peace against him." And with respect to the other part of the case, he says, "the defendant knew and approved of the business his wife carried on, and was aware of the prosecution, without expressing any dissent to the plaintiff's defending her. I think a promise may fairly be inferred, on the part of the defendant, to pay the plaintiff for his labor in conducting the defence." It will be seen by an examination of this case and other cases of like character, and also by the examination of that class of cases where the husband has deserted his wife or causelessly turned her away, and has been held liable for necessaries, that, in the first case, the professional services rendered for the wife, were necessary to protect her from actual violence, and, in the latter, the articles furnished were necessary for her subsistence and support. How can this court determine whether it was *necessary* for the wife to defend the bill of divorce instituted against her by the husband? Suppose all the charges in the bill were true, will this court sit and determine whether the bill ought to have been granted? And can it make any difference with the the defendant's liability whether

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the prayer of the bill was granted, or whether the bill was dismissed? If this court sustain the decision of the court below, they extend the liability of the husband indefinitely; but the adoption of the old rule, making the husband liable only "*pro necessariis victu et apparatu*," will reduce that liability to legal certainty and keep it within known bounds.

III. As to that part of the plaintiff's account which accrued in the commencement and prosecution of the libel for divorce brought by Mary S. Hurlburt against the defendant. If the court should interpose and protect the wife from the bill of the husband, and compel the husband to pay the expenses of its defence, they certainly will not place in her hands a sword and compel the husband to pay for her means of attack. There may be some apology for the court in sustaining the first part of the case, but we think they never can make the husband liable for this part of the plaintiff's account. And the fact that the divorce was granted on the bill of the wife, can make no difference.

The supreme court allowed Mary S. Hurlburt $250, as alimony — more than sufficient to pay all the expenses of both bills.

The cases cited by the plaintiff, from the English ecclesiastical reports, can have no authority in a court of common law jurisdiction.

J. A. Wing, pro se.

I. Is the husband bound to pay the attorney for his services on the retainer of the wife, in a case brought by the wife against the husband for a divorce, on the ground of *intolerable severity*, where a bill is granted for that cause?

The granting of the bill is conclusive evidence that the husband was guilty of intolerable severity, and that his wife had just cause to appeal to the laws for protection. If the husband, by his cruel conduct, compels the wife to seek protection from him, by an appeal to the laws, will this court deprive her of the means of appealing effectually?

In matters of divorce, this court sit as a court of law, deriving all their powers from the statute, and are not governed by the rules of the English ecclesiastical courts. *Harrington* v. *Harrington*, 10 Vt. R. 505. This court has no power to grant temporary alimony. Ibid. The statute gives this court

no power to award costs to either party in cases of divorce. It only gives power to grant alimony after the granting of the bill. This has no reference to the expense of procuring the bill. The legislature has left this as it was by the common law. If the husband abuses his wife, how shall she be protected? Can she employ counsel to assist her? And if so, who is liable to pay for the service? It is clear that the wife cannot bind herself. The husband, by his conduct, gives her a credit, which she has a right to use for her protection. The husband is bound to pay for all necessaries provided the wife, when, by his intolerable severity, he drives her from his home. He is bound also to pay for legal assistance which may thus be rendered necessary. Clancy, on the Rights of Women, p. 52, says: "Legal assistance 'may, also, be, in some instances, necessaries which, if sup-'plied for the wife, the husband must pay for, as when he 'turned his wife out of doors, without just cause, with cir-'cumstances of great violence, and she exhibited articles of 'peace against him, the attorney, who preferred the articles, 'brought an action against the husband for the business done 'on the retainer of the wife, and had a verdict. *Shepherd* 'v. *Mackoul*, 3 Camp. 326. Lord Ellenborough observed in 'this case, speaking of the articles of peace, that if that pro-'ceeding was uncalled for, his wife certainly could not make 'him liable for the expense thereby incurred; but if she was 'turned out of doors in the manner stated, she carried along 'with her a credit for whatever her protection or safety re-'quired. She had a right to appeal to the law for protec-'tion, and she must have the means of appealing effectually. 'She might, therefore, charge her husband for the necessary 'expenses of the proceeding, as much as for necessary food 'and raiment. In like manner, in *Williams* v. *Fowler*, '1 McClelland & Y. 269, where the defendant had driven 'his wife from his house by his cruelty towards her, and pro-'ceedings at her suit, at law or in equity, arising from his 'misconduct, were instituted against him by the plaintiff, an 'attorney, it was held that the husband was liable to the 'amount of the plaintiff's bills of cost incurred in those pro-'ceedings. The cases, therefore, turn on this construction, 'which is common to both, that the *proceedings* were ren-'dered necessary by the defendants' own conduct towards

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'their wives; and the question for the jury in all such cases 'must be, whether the treatment of the wife by her husband 'was so bad as to render her recourse to legal protection 'necessary."

In England all questions in relation to divorce are tried in the ecclesiastical courts, and by reference to the decisions in those courts we shall find that the husband is bound to pay the wife's cost. The case of *Harris* v. *Harris*, 3 Eccl. R. 153, was a petition by the wife for divorce, on the ground of adultery of the husband. The court say that the husband is bound to pay the cost, on both sides. Also, in the case of *D'Aguilar* v. *D'Aguilar*, 3 do. 329, the court say: "In general, the wife would be disarmed and denied justice." This was, also, a petition by the wife for a divorce from her husband. This court, also, as a general rule, grant the wife alimony, *pendante lite*.

The rule that requires the husband to pay the cost when the wife had cause of complaint against him, is founded on the plainest principles of reason and common sense. If the husband's conduct towards his wife is so cruel that she is compelled to have recourse to the law for protection, she must, (in the language of Lord Ellenborough,) have the means of appealing effectually. And as, in the case of *Williams* v. *Fowler*, where the defendant's conduct compelled the wife to institute proceedings at law, and in equity, against the husband, they held him liable, on the ground that the proceedings became necessary from the defendant's own conduct towards the wife; and the question for the jury, in all cases, must be, whether the treatment of the wife by the husband was so bad, as to render her having recourse to legal protection necessary.

In the case at bar, were the proceedings at law necessary? The supreme court have said they were, and granted a bill of divorce from the defendant for his intolerable severity towards his wife. After the decision of the court, it is too late to say the proceedings were uncalled for. We insist, then, that the husband is bound to pay the expense.

The granting of alimony can make no difference in the case. All the liabilities had accrued against the defendant prior to the decree, and could not be changed by the decision as to alimony. Suppose a man should so abuse his wife

that she could not live with him, and the court grant her a bill, but give her no alimony. How is the attorney to get his pay for his services, &c.? The wife cannot bind herself. She may have no friend that will aid her, and she must submit to his abuse for the term of her life, or this court must say that when she has just cause of complaint for the abuse of her husband, she must have the means of complaining effectually.

II. Is the husband bound to pay the expenses of the wife in defending against a petition for divorce, brought by the husband against her, when he has no cause of complaint, and his petition is dismissed? It is necessary she should be defended; especially if the charges are false; and if the husband will not furnish her with money for her defence, if she employ an attorney to defend her, he may recover the same of the husband. The legal assistance is as much necessaries, as food and raiment.

The wife's situation is truly deplorable, if the husband is not bound to pay the expenses, if he fail in a suit for divorce against her. She cannot bind herself or make herself liable for the expenses of defending his suit. She cannot pay out of her own property, for the wife has no property she can control. This court have no power to grant her alimony to assist in the defence, or to order the husband to pay cost. Then how is she to procure counsel and witnesses to prove the falsity of his charge?

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The principal question in this case is, whether the defendant is liable to the plaintiff, for professional services, rendered for the wife of the defendant, in procuring a divorce from him, and in resisting the petition, which he preferred for the same purpose. There was no engagement or employment of the plaintiff by the defendant, but the services were evidently performed, contrary to his wishes and inclination; and if he is liable, it is on his assent, as resulting from the circumstances of the case, implied by law, even against his express wishes.

The husband is liable for necessaries furnished his wife, under such circumstances that it may be presumed he would have consented; but this usually means necessary

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meats, drinks, clothing, medicines, &c. When he turns her out of doors, without fault on her part, or she is compelled to abandon his house on account of his cruelty, she carries with her a credit for such necessary articles as may be essential to her maintenance and support, and every thing necessary for her safety and preservation. For this purpose, legal assistance has been deemed, in some cases, to come within the meaning of necessaries, for which the husband is liable.

To exhibit articles of peace against him, to lay him under bonds to keep the peace towards her, is necessary for her personal security, to protect her from personal violence. This was the decision of Lord Ellenborough in the case of *Shepherd* v. *Mackoul*, 3 Camp. 326. When the wife was compelled to institute proceedings against him, in law and equity, to compel him to furnish her with a support and maintenance, the legal assistance furnished was deemed necessaries, for which the husband was made liable. *Williams* v. *Fowler*, cited in Clancy's Rights of Married Women, 52. In all such cases, it is for a jury to determine whether her treatment was such as to justify any person in furnishing her with support, or legal assistance, contrary to the wishes of the husband, and where the law will declare his assent thereto. But to dissolve the bonds of matrimony between them, on her request, or to resist his petition for that purpose, cannot be considered as necessary for her safety or preservation, so as to enable her to procure professional assistance therefor, on his credit and at his cost. No case is found where this was ever attempted.

In the ecclesiastical courts in England, costs may be decreed in any case when the court think proper. Hence it is not unusual to decree costs to be paid by the husband, in suit for a divorce. The case of *D'Aguilar* v. *D'Aguilar*, 3 Eccl. R. 329, was of this description. The courts may, in such case, decree temporary alimony, while the suit is pending, not only for the support of the wife, but to enable her to prosecute or defend the same. But all the powers of this court on the subject of divorce are given by statute, and the court is not authorized, either to decree temporary alimony, or award costs. *Harrington* v. *Harrington*, 10 Vt. R. 505.

As the legislature have not thought proper to authorize the

court to give cost in such case, (and the reasons are obvious and forcible, why they should not) we cannot indirectly amerce the losing party, with the expense of the proceeding, as we should if a judgment for the plaintiff could be had in this case. If such a recovery can be had in a court of law, it would necessarily lead the auditors or jury, to re-examine the ground on which the court proceeded in granting the divorce; whether the evidence showed either the necessity or expediency of prosecuting or defending the petition. Or else, to avoid this inquiry, a recovery must be permitted against the husband for professional assistance rendered in all cases of an unsuccessful application on his part, if it was defended by the wife, and in all cases of successful application on her part. The refusing the petition in the one case, and granting it in the other, would imply a fault and neglect of duty in the husband. And the rule could not be reciprocal, if the wife was the guilty party, or preferred a slanderous and groundless petition, unless she or her friends could be compelled to give him security for costs in case of failure. The objections to a recovery are so formidable, and the case is so wholly unsupported by precedent, that we are not prepared to adopt a new principle in relation to the liability of the husband, and sustain an action where none has heretofore been brought or sustained. The plaintiff, therefore, cannot recover of the defendant for professional services rendered on either of the petitions, brought by the defendant or his wife.

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The question in relation to the tender was decided in the case of *Pratt* v. *Gallup*, 7 Vt. 344. Where a party intends to rely upon a tender, he cannot make the tender on the trial before the auditors, but must bring the money into court. It was also decided, in that case, that goods or services furnished or rendered, after the commencement of the suit, became a part of the account, and the party furnishing or rendering them, was not obliged, at a time subsequent to the charge, and while the suit was pending, to receive the pay for a single charge, at the hazard of having this payment turn the suit against him. If this produces either inconvenience or injustice, it cannot be remedied by the court, but must be the subject of legislative enactment. The judgment of the county court is reversed, and judgment

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will be rendered for the plaintiff to recover the other part of his account, amounting to two dollars, seventy-one cents. The defendant will recover his cost in this suit, to be deducted from the cost awarded to the plaintiff in the county court.

HOLBROOK, BOWMAN & CO. *v.* ALONZO PEARCE, CHARLES S. DWINNELL and CARLOS BANCROFT.

A certificate of jail commmissioners, setting forth an execution for a sum different from that on which the debtor is committed, will not authorize his discharge, although the proper oath may have been administered to him.

THIS was an action of debt on jail bond, executed upon the commitment of the defendants, Pearce and Dwinnell, on an execution for the sum of $375.72 damages. The defendants pleaded two pleas in bar, in the first of which, they alleged that the commissioners of jail delivery for the county of Washington, administered to the debtors, Pearce and Dwinnell, the oath by law provided to be administered to poor debtors, and delivered to them certificates, in due form of law, which were, by them, delivered to the jailor, before their departure from the liberties, &c. In the second plea, the defendants alleged the administration to Pearce and Dwinnell of the oath by law provided, and the delivery to them of certificates, which defendants set forth in their plea, and which described the execution on which Pearce and Dwinnell had been committed, as an execution for the sum of $325.72 damages. The first plea was traversed. To the second there was a demurrer.

The court rendered judgment that the second plea in bar was sufficient, and that defendants recover their costs; from which decision the defendants excepted.

After argument by *J. A. Wing* for plaintiff, and *L. B. Peck* for defendant, the opinion of the court was delivered by

ROYCE, J. — This case comes before the court upon demurrer to the second plea in bar, which sets forth the whole

proceedings before the board of jail commissioners, including a literal transcript of the certificates issued by them to the defendants, Pearce and Dwinnell. It is made a question in the argument, whether it should be understood, upon a just construction of the whole plea, that the oath actually administered to the debtors was the oath given in the present statute, or the one prescribed by the repealed law: — and if the latter, whether that oath was a substantial and sufficient compliance with the existing law, so as to entitle the debtors to their certificates of discharge. But since there is another satisfactory ground upon which to rest our decision, I shall pass this part of the case without expressing an opinion.

If it is conceded that a sufficient oath was duly administered, that alone did not effect the legal discharge of the debtors. It was also necesaary, before they could be authorized to depart, that proper certificates should be given, and delivered over to them and the jailor, especially to the latter. *Staniford* v. *Barry*, Bray. R. 200; *Haight* v. *Richards*, 3 Vt. R. 77. In this respect the requirements of the old and new law are the same. And when these certificates come to be pleaded, they must appear to apply, with requisite certainty, to the execution mentioned in the declaration. Otherwise, the plea can be no answer to the action. Now the declaration in this instance sets forth a judgment and execution for $375.72 damages, whereas, the certificates describe an execution for $325.72 damages. This is a difference which apparently destroys the identity of the execution, and must be fatal to the plea, as well upon the ground of repugnancy and variance, as on the ground that no certificates appear to have been granted, which were applicable to the demand sought to be recovered in this action. *Sherwin* v. *Bliss*, 4 Vt. R. 96; *Avery* v. *Lewis*, 10 Vt. R. 332.

The judgment of the county court is accordingly reversed, and the plea is adjudged insufficient. But as there are other defences undisposed of in that court, the cause is again sent there, to be proceeded with in reference to those defences.

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EBENEZER PARKHURST v. SAMUEL EDWARDS, JR.

Parkhurst v. Edwards.

A plaintiff in ejectment is not precluded from recovering, on the ground of having executed a deed to a third person while the premises were holden by another adversely to both the parties to the deed.

EJECTMENT for a lot of land in Roxbury, of which Ebenezer Parkhurst was original proprietor. Plea, general issue, and trial by jury, and verdict and judgment for plaintiff.

On trial of the cause, the plaintiff offered the charter of the town, in which is the name of Ebenezer Parkhurst, and also other evidence, tending to show the plaintiff to be the same Ebenezer Parkhurst.

The defendant offered a copy of a deed from the plaintiff of the same lot, to Darius Spalding and Allen Spalding, duly signed and sealed, witnessed, acknowledged, and recorded, before the commencement of this action; and it was admitted that, at the time of executing said deed, the defendant was in possession of the premises, claiming adversely to the plaintiff.

The defendant's counsel insisted that the plaintiff, having thus parted with his title to the premises, was not entitled to recover; but the court decided that, inasmuch as there was an adverse possession at the time of giving the deed, the same was void, and charged the jury accordingly. To which decision and charge the defendant excepted.

J. L. Buck, for defendant.

The question in this case is, whether the plaintiff, after having deeded the land in question, so that the title of record is in other persons, can recover in an action of ejectment. This must depend upon the construction of the 26th and 27th sections of chap. 60, Rev. Stat. page 315. The first of the above sections declares every deed, lease, and other conveyance of land absolutely void, and of no effect to convey said land, if, at the time of the delivery thereof the same is claimed adversely by a person in possession. The 27th section provides that the grantor shall be bound by all the covenants in such deed. What, then, is the effect of the above sections taken together? It is, that, after a recovery in this suit, the grantees may take possession, and the covenants in the plaintiff's deed will prevent his ever recover-

ing of them. The plaintiff has, in form, parted with his title, and, as we insist, is precluded by his covenants from ever again obtaining possession, so that, in effect, the deed must operate as a conveyance.

If these positions are correct, then the latter of the two sections above named, is inconsistent with the first, and if so, one or the other must be disregarded.

Again: the object of the law was, to prevent litigation, or in other words, to prevent men from buying lawsuits. But how is this prevented, if the grantee may cause a suit to be instituted in the name of the grantor, and, after judgment, the land remains the property of the grantee?

L. B. Peck, for plaintiff.

The conveyance from the plaintiff to Spalding passed no title. The defendant being in possession at the time, and claiming *adversely* to the plaintiff, the deed was void under our statutes, (Rev. Stat. p. 315, §26) and the action is correctly brought in the plaintiff's name. *Brinley* v. *Whiting*, 5 Pick. 348; *Stevens* v. *Dewing*, 2 Aik. R. 112; *Williams* v. *Johnson*, 5 Johns. R. 489; *Wolcott* v. *Knight*, 6 Mass. R. 418; 4 Kent's Com. 440; *Thomas* v. *Perry*, Peters' C. C. R. 49.

The opinion of the court was delivered by

REDFIELD, J.—The only question to be determined in this case is, whether the plaintiff in ejectment is precluded from recovering, on the ground of having given a deed of the land sued for, while there was an adverse possession of the same.

The statute provides that such a deed shall be void. The grantee cannot, of course, recover in his own name. Unless, then, there could be a recovery in the name of the grantor, the right of action, which before was perfect, it may be, against the disseizor, would be lost by the *operation of a deed*, which the statute provided should have *no operation*.

But it is said, by that provision of the statute making the *covenants* operative, the grantor will be estopped from disputing the right of the grantee to the land, when recovered, and thus the deed will, in effect, be made operative to

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convey the land. This may be true. But it is a result which the law produces, and which the court cannot, and would not, prevent. That provision in the statute must be repealed if it is injurious, or operates to destroy the effect of the general provision of the statute. But we do not see that such is the effect. The deed is void so far as third persons are concerned. Between the parties it was not intended to be made so.

Judgment affirmed.

ORAMEL H. SMITH *v.* JONATHAN C. SMITH.

When the principal of a note, together with the interest, exceeds twenty dollars, the right of appeal from a judgment of a justice, thereon, is not taken away by statute.

THIS was an action of assumpsit, commenced before a justice of the peace, on a promissory note for $16, dated April 1, 1835, and payable with interest, in which the plaintiff laid his damages at $25, and recovered a judgment before the justice, for the sum of $20.40 damages and his cost. From this judgment the defendant appealed to the county court; and on the entering of the appeal, the plaintiff moved that the same be dismissed for want of appellate jurisdiction in that court. The court decided that the appeal be dismissed, for the want of jurisdiction; to which decision the defendant excepted.

J. A. Vail and *W. K. Upham*, for defendant.

The only question in this case, is, had the county court appellate jurisdiction? We insist that the case was appealable, by the 45th section of chapter 26 of the Revised Statutes, page 174, and is not within the restriction of the 51st section of that chapter. The 51st section declares that "no appeal shall be allowed in actions on notes of an amount not exceeding twenty dollars." Rev. Stat., p. 175. The amount of a note is the principal and interest added together. And more than $20 principal and interest was due upon the note in suit, at the time the suit was commenced, and at the time

of the appeal. Not only was the principal and interest of the note over $20, but the sum recovered before the magistrate was over $20, and the *ad damnum* in the plaintiff's writ was over that sum. How, then, can it be said that this was a note of an amount not exceeding $20?

It is the amount appearing to be due from the note, or from the record of a judgment, that is to determine the question of jurisdiction. *Brush et al* v. *Torrey*, Brayton's R. 141; *Southwick et al.* v. *Merrill*, 3 Vt. R. 320; *Church* v. *Vanduzee*, 4 do. 195; *Hill* v. *Wait*, 5 do. 124; *Boardman* v. *Harrington*, 9 do. 151; *Perkins* v. *Rich*, 12 do. 595. See also the Revised Statutes, p. 170, sec. 8.

O. H. Smith, pro se.

The plaintiff contends that the county court has no appellate jurisdiction of this action. The statute, page 175, sec. 51, provides that "no appeal shall be allowed in actions on notes and accounts stated of an amount not exceeding twenty dollars."

It is apparent that the reason for restricting the right of appeal in these cases was, "that demands of that nature carried with them so much certainty, and were generally so free from dispute, that sound policy required that the judgment of a justice upon them, when they did not exceed $20, should be final; and that, to allow an appeal, would only lead to useless expense and delay." See *Baker* v. *Blodgett*, 1 Aik. R. 342.

This case comes clearly within the letter as well as the true intent and meaning of the statute resisting the right of appeal. It has been held, that promissory notes exceeding $20, but endorsed below $20, were appealable. This virtually decides the question. The amount of the note, as originally given, therefore, determines the jurisdiction. *Boardman* v. *Harrington*, 9 Vt. R. 151.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The question in this case is whether the county court had appellate jurisdiction of this action. The statute takes away the right of appeal in actions on note, of an amount not exceeding twenty dollars. When a note is payable with interest, the interest is a part of the

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contract, and the principal and interest together constitute the amount of a note, unless there is an endorsement. In this case it appeared, from the declaration, the amount recovered, and the *ad damnum*, that the amount of the note exceeded twenty dollars, and was, therefore, appealable. The decision in the case of *Boardman* v. *Harrington*, 9 Vt. R. 151, was on another branch of the statute, taking away the right of appeal, when the matter in demand did not exceed ten dollars. The decision in the case of *Tyler* v. *Lathrop*, 5 Vt. 170, was before the passing of the present statute, which provides that the matter in demand, in an action on note, should be considered the amount of the note deducting endorsements. Neither of these decisions are opposed to the views which we entertain in the present case. The right of appeal was not taken away, in this case, and the judgment of the county court, dismissing the action, was erroneous, and is reversed.

Town of NORTHFIELD *v.* Town of ROXBURY.

A married woman is not liable to be removed, as a pauper, from her husband, or from the place of his actual residence, to the place of her own legal settlement, though the husband may have no settlement within the state.

Two JUSTICES ordered the removal of one Mary Nary from Northfield to Roxbury. On appeal, the following plea and replication were interposed: —

And for further plea in this behalf, the said town of Roxbury, leave being first had, say that said Northfield ought to be barred from having and maintaining said order of removal because they say that at the time said order was made, and a long time before, to wit, for five years, the said Mary was, and still is the lawful wife of one Edward Nary, who then, and long before, and ever since resided in said town of Northfield, and then and there had his domicil, and still resides there, and is now living, and the said Mary, during all that time, resided in said Northfield until she was removed under said order to said Roxbury, which they are ready to verify. Wherefore, they pray judgment that said Northfield be bar-

red from having and maintaining their said order, and for their costs.

And the said Northfield, in answer to the plea of the said Roxbury, secondly above, pleaded in bar, say, that for anything therein contained, said Northfield ought not to be barred from having and maintaining their said order of removal against said Roxbury, because, although true it is that the said Mary Nary, the pauper in said order of removal, named, was, at the time of making said order, the lawful wife of one Edward Nary, who then lived in said Northfield, yet, the said Edward Nary was, at the time of his marriage with the said Mary, a foreigner, and had not, at that time, nor has he since, gained a legal settlement in said Northfield, nor in any other town in this state, and this the said Northfield is ready to verify.

To this replication the appellants demurred generally, and the plaintiffs joined in demurrer. The county court adjudged the replication insufficient; to which decision the plaintiffs excepted.

J. L. Buck, for plaintiffs.

The question for decision, in this case, arises upon the second plea in bar, of the defendant, and replication thereto, to which there is a general demurrer.

The demurrer reaches the first defective plea, and, unless the facts stated in that plea are sufficient to bar the plaintiff, the judgment of the county court is erroneous.

The plea alleges that the pauper was, at the time of making the order, the lawful wife of one Edward Nary, who, for five years before, and at that time had his domicil in Northfield. It does not allege that either the pauper or her husband had a legal settlement there.

The replication shows that the husband of the pauper was a foreigner and had not gained a legal settlement in Northfield, nor in any other town in the state.

Unless the fact that the pauper was a married woman, and that her husband, with her, had their domicil in Northfield, is a sufficient reason why she should not be removed, the plea in bar is insufficient.

The statute provides that, "a married woman shall always follow and have the settlement of her husband if he have any

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within this state, otherwise, her own, at the time of her marriage, if she have any, shall not be *lost or suspended* by the marriage." R. S. chap. 15, §1, p. 99.

It would seem that the statute is broad enough to reach this case.

It may be urged by the defendant that a married woman cannot be removed from her husband, but if so, what is the meaning of the term "*suspended*," in the statute above cited?

I can see no other meaning, than that a marriage of a woman with a man having no settlement in the state, shall not prevent her removal at any time when she shall be poor and in need of relief. *Lebanon* v. *Hebron*, 6 Conn. R. 45. Reported in vol. 1st, 2nd series.

L. B. Peck, for appellants.

The opinion of the court was delivered by

Royce, J. — It must be intended from the pleadings that the pauper's maiden settlement was in the town of Roxbury. And the present statute enacts that, since her husband has no settlement within the state, her settlement shall be neither lost nor suspended by her marriage. The question is, whether, by force of this statute, she is liable to be removed from her husband, or from the place of his domicil and personal residence.

The extent to which the statute was intended to operate is somewhat doubtful. It is evident, however, that it may operate to important purposes, without authorizing a removal of the wife in a case like the present. In proof of this I need only mention its effect in reference to the children of such a marriage. Under the statute these at once take the settlement of their mother, in conformity with the doctrine held in *Newton* v. *Stratford*, 3 Conn. R. 600, and *Lebanon* v. *Hebron*, 6 do. 45. Whereas, if her settlemont were left suspended according to the old law as generally received, it might be doubted whether the children could ever derive a settlement from her, unless, by reason of the husband's desertion and leaving the state, or the dissolution of the marriage by divorce, or by the husband's death, her settlement should be revived before the children became of age, or

emancipated. See *Bethel* v. *Tunbridge*, 13 Vt. R. 446. We are not to suppose the legislature to have been unmindful of that great principle of social and moral policy, which forbids the coercive separation of the wife from her husband, except for crime. It was recognized as pervading our system of poor laws in *Hartland* v. *Pomfret*, 11 Vt. R. 443. Nor are we disposed to infer a design to break in upon this principle, so long as the words of the recent act will admit of a less rigorous construction. Now the liability of the wife, whenever she becomes chargeable as a pauper, to be thus taken from her husband and family to the place of her legal settlement, is no where expressly affirmed in the statute. If the liability exists, it must result as the necessary consequence of her being a pauper and having a settlement. And it is true that when these facts concur, there is generally a right in the town where the pauper resides to cause an immediate removal. But this general rule, like most others, has its exceptions. Some legal impediment may intervene to prevent a removal, without any loss or suspension of settlement. Thus, children of that tender age which requires the nurture of a mother, are not removable from her to their place of legal settlement. Nor can a person, owning and occupying a freehold estate, be removed from it, however inadequate it may be to furnish the needed support. *Londonderry* v. *Acton*, 3 Vt. R. 129; *Randolph* v. *Braintree*, 10 do. 442. And since the point under consideration is left, to say the least, in doubt by the statute, we think the condition of a wife whilst living with her husband, or under his immediate control and protection, should be treated, for the present purpose, as being analogous to that of the persons just named; and, consequently, that though this pauper has a settlement in Roxbury, she is not at present liable to be removed.

The judgment of the county court is, therefore, affirmed.

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Baylies v. Trustees of Houghton & Co.

HORATIO N. BAYLIES *v.* JAMES HOUGHTON & Co. principal debtors, and DODGE & KEITH and CHARLES SPALDING, Trustees.

A promissory note, executed in, and made payable to citizens of, the state of Massachusetts, although the maker reside in this state, is not subject to our trustee process, it being, by the law of the place of contract, exempt from such process.

TRUSTEE PROCESS against Dodge & Keith and C. Spalding, who were sued as trustees of James Houghton & Co. of Boston, in the state of Massachusetts. In the county court, Dodge & Keith made their disclosure in writing, setting forth, that, at Boston aforesaid, on the 17th September, 1841, they executed their promissory note for $357.64, made payable to the said Houghton & Co. or order, in six months from date; and that on the 19th of April, 1842, at said Boston, they executed another promissory note for $127.20, made payable in six months from date, to said Houghton & Co. or their order, which notes remained unpaid.

And the said Charles Spalding in like manner disclosed, that, on the 15th September, 1841, at said Boston he executed his note payable to said Houghton & Co. or their order, for $410.07, in six months from date; and on the 16th of April, 1842, executed another note payable in the like manner and time, for $158.71, which notes remained unpaid.

Upon these disclosures, the court decided that the said Dodge & Keith, and Charles Spalding were not liable, as trustees, and rendered judgment for them to recover their costs, to which decision the plaintiff excepted.

H. W. Heaton and *C. Reed*, for plaintiff.

I. The authorities are uniform, that debts due the residents in a foreign jurisdiction can be attached and holden by trustee process in favor of creditors; and that the payments of the debtor under the judgments in such trustee suits are, in all jurisdictions, admitted as a defence, *pro tanto*. *Bissell* v. *Briggs*, 9 Mass. R. 462; Story's Con. of Laws, § 450; *Embree & Collins* v. *Hanna*, 5 Johns. R. 101; *Holmes* v. *Remsen*, 20 Johns. R. 229; S. C. 4 Johns. Ch. R. 467;

Hull v. *Blake*, 13 Mass. R. 153; *Merriam* v. *Rundlett*, 13 Pick. R. 511; *McDaniel* v. *Hughes*, 3 East, 367; *Le Chevelier* v. *Lynch*, 1 Doug. R. 170; *Barrow* v. *West*, 23 Pick. R. 270; *et passim*.

In proceedings *in rem*, the judgment is of universal obligation, and proceedings by way of attachment of debts in favor of creditors are entitled to the same consideration. Story's Con. of Laws, § 592, and cases cited. And debts, with respect to the liability of the debtor, follow him, and are subject to the jurisdiction of the law of his domicil, where process must be brought to enforce the contract. *Blake* v. *Williams*, 6 Pick. R. 286. The *locus rei sitæ* of debts with reference to creditors, is the locality of the debtor. 2 Kent's Com. 406.

That a judgment obtained in one jurisdiction against a principal debtor, resident in another, without legal service upon the principal debtor, cannot be enforced in the courts of the foreign jurisdiction against him, we well understand; but insist that it is a defence to the trustees who have been compelled to make payment by the judgment. Chief Justice Parsons sets forth this distinction in *Bissell* v. *Briggs*.

II. The courts of Massachusetts, where the notes were given, have admitted, as a defence, proceedings under statutes like our own, making negotiable paper trusteeable, and though the notes were endorsed before due. *Hull* v. *Blake*, 13 Mass. R. 153; *Merriam* v. *Rundlett*, 13 Pick. R. 511. It may be attempted to distinguish the present case from these. It is different, first, in that there has been no legal service on the principal defendants. And there was none in the trustee process sustained in *Barrow* v. *West*, 23 Pick. R.; *Blake* v. *Williams*, 6 Pick. R.; *Embree & Collins* v. *Hanna*, 5 Johns. R., and in other cases. There is this further distinction, that these notes were made in Massachusetts, and not where they are attached by trustee process; whence it may be inferred that they cannot be discharged, except by the law of the place where made, according to the doctrine found in Story's Con. of Laws, § 335 and 342. This doctrine is held in reference to discharges by bankrupt laws, &c., without payment for the benefit of the promisee. The cases that may be cited are no precedents for this, in which, by a judgment for the plaintiff, the notes would be paid for the

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benefit of the promisees. The notes are payable everywhere; (8 Pick. R. 197) and a payment in Vermont should be good everywhere.

III. At the time of disclosure, all the notes were overdue, and it is to be presumed no notice of indorsement had been received, except that disclosed. If the notes had been endorsed, notice would have been given by the new holders to the makers, by a demand according to the law-merchant. All these notes, then, but one, were in the hands of the payees and overdue at the time of disclosure. And negotiable paper, overdue, stands upon the same footing as other *choses in action*. If any debt can be attached that is due a resident of Massachusetts, this can. *Hinsdill* v. *Safford*, 11 Vt. R. 309; *Hutchins* v. *Evans*, 13 Vt. R. 541.

IV. It is a well established rule of policy and practice for courts to prefer the interests of their own citizens. Story's Con. of Laws, § 28. Resident creditors, attaching by trustee process are, throughout the United States, preferred to foreign assignees in bankruptcy, whether the assignment be voluntary or by operation of law. *Ingraham* v. *Geyer*, 13 Mass. R. 146; *Ogden* v. *Sanders*, 12 Wheat. R.; 15 Pick. R. 11; 5 Greenl. R. 245, *et passim*. The principal debtors having become insolvent, the resident creditors should be preferred. It would be absurd to extend the comity of law so far as to secure to foreign holders the contents of their notes, when under the same circumstances residents would lose them. By the well known exception to the rule of comity, the laws of a foreign state should not be admitted, if injurious to ourselves. *Prentiss* v. *Savage*, 13 Mass. R. 24. No state of the Union has committed such an act of injustice to its own citizens as to send abroad property of insolvents found within its jurisdiction, when there were resident creditors. 2 Kent's Com. 406–7.

Whatever may be the policy and laws of other states, this state should enforce and vindicate her own, by which the notes disclosed are clearly attachable. This state alone has jurisdiction of the persons of the trustees, and to this forum, alone, can the holders of the notes resort to collect them, where the judgment in this case will be a bar. The legislature would have exempted foreign holders from the general provisions of the statute of 1841, had it not been

the intention to extend it to all cases alike. And if the act, being constitutional, results in a conflict of laws, legislation alone should remove the difficulty. *Penniman* v. *Meigs*, 9 Johns. R. 325; 1 Gall. R. 168—*de conflictu legum*.

N. Kinsman & *A. Spalding*, for trustees.

The law of the place where the contract is made must govern the construction of the contract, and that whether the parties to the contract are inhabitants of that place or not. This rule is founded upon the presumption of law that the parties to a contract are conusant of the laws of the country where the contract is made. Negotiable paper is governed by the same principles. Wherever the contract between the particular parties is made, the law of the place will operate as well in respect to the discharge as to the obligation thereof. Story on Conflict of Laws, 199, 219, 282, 283; 13 Mass. R. 5 and 153; 16 Mass. 304; and it is enacted by the 12th section of the statute of Massachusetts, "that no person shall be considered or adjudged to be a trustee, within the intent and meaning of that act, by reason, or on account of, his having made, given, indorsed, negotiated or accepted, any negotiable security whatever." Hence if the *lex loci* governs in the discharge, as well as in the construction, the trustees cannot be held liable for the notes in question. They were negotiable, and made in Boston, payable to the defendants, living in Boston, and must be governed by the law of Massachusetts. If payable every where, they are governed by the law of the place where made, for the plain reason that they cannot be said to have the law in any other place in contemplation to govern them. Story's Conflict of Laws, 264.

The trustees insist that they ought to be discharged, inasmuch as a judgment against them here would not be a bar to an action on the notes in question in the state where the notes were made and payable, for the statute in that state exempts negotiable notes from the liability of the trustee process; and it would be manifestly unjust to place the trustees in a condition in which they may be twice charged for the same credits. The credit, therefore, liable to this attachment, must be so situated that, if it be taken by the attaching creditor, the trustee may legally defend himself when called on by the principal, and, in this case, a judg-

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ment against the trustees, would not be conclusive against the principal debtor. Story on Conflict of Laws, 492, 501, 508. In order to found a proper ground of recognition of any foreign judgment in another country, it is indispensable that the court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunal, and this is equally true, whether the proceedings be *in rem*, or *in personam*, or *in rem* and also *in personam*. Story on Conflict of Laws, 492, 449, 458; 9 Mass. R. 462.

The opinion of the court was delivered by

REDFIELD, J. — It seems now to be an acknowledged principle of the law of foreign attachment, that a payment made under such proceeding will protect the garnishee, unless the court acted without jurisdiction, although there are some early cases to the contrary of this even. The jurisdiction of the debt to some extent depends upon the domicil of the debtor, so that the court may be considered, in one sense, as having jurisdiction of this debt, perhaps; and should we render judgment here that the trustee is liable, it is probable the courts of Massachusetts might consider it a defence to the notes, *when sued there in the names of the principal defendants*.

But it is obvious, that in proceeding to render such judgment, we should violate the obvious principles of justice, in regard to the construction of contracts; and so far as any person is concerned, into whose hands such notes may have come, or shall hereafter come, by assignment, any judgment we should here render could not, either in equity, or at law, be considered strictly any defence to the trustees, who should be compelled to pay the money under such judgment. This consideration of itself is sufficient reason why we could not proceed to render any such judgment.

The indebtedness of the trustees is by way of negotiable promissory notes, executed at Boston, payable to the principal defendants, or their order, and by intendment of law, payable at Boston. The place of contract is, therefore, at Boston. All the incidents of the contract, which concern its force and

validity, or its performance, or discharge, are to be governed by the laws of that place. And this principle of law, by which we refer these incidents of contracts to the law of the place of contract, is now found to have its foundations deeper laid in the eternal principles of justice, than any matter of mere national comity. These incidents are to be governed by the *lex loci contractûs*, not because the sovereignty of the *former*, where the contract is sought to be enforced, happens to be on terms of courtesy and kindness with the sovereignty of the place of contract, but for the higher and more worthy reason, that the parties, in entering into the contract, expected those incidents to be governed by that law, and that only; and if they are referred to the law of any other place or country, it is not the contract of the parties, but of the court, which is made to speak, and is enforced.

By the law of the state of Massachusetts, negotiable promissory notes, like those now in question, are not liable to attachment by this process. Any one, therefore, to whom these notes have been negotiated, or may hereafter be, will take them with this expectation. They are, in no sense, parties to this proceeding, or bound by it. Our judgment, here, then, must be wholly nugatory so far as they are concerned. We should not be prepared to render a judgment against the trustees, unless that judgment would operate a perfect defence to them everywhere. We could not justly expose them to the hazard of paying their notes twice; nor, on the other hand, if we felt that the Massachusetts courts would probably regard any judgment we should here render, as a defence, (which is not probable, if the notes were sought to be enforced by a *bona fide* holder) would *we* subject the contract to a law by which *it* was never expected to be governed, and thus defeat the interest of a *bona fide* holder. *Prescott* v. *Hull*, 16 Johns. R.

If this were a contract of a different character, or payable in this state, very likely the propositions urged by the plaintiff's counsel, with so much plausibility, would merit a different consideration. *Hull* v. *Blake*, 13 Mass. R. 153; *Embree & Collins* v. *Hanna*, 5 Johns. R. 101.

But as the case now stands, there is no good reason appeant to us, why a promissory note, executed, and to be paid

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in another state, where its negotiability is, in no sense, liable to be affected by trustee process, should here be subject to that process, and thus be discharged, without regard to the governing law of the contract, any more than such contracts, or any other, could be discharged by a foreign bankrupt law, which it is now well settled cannot be done. Story's Con. of Laws, 283; *Braynard* v. *Marshall*, 8 Pick. 194; *Lewis* v. *Owen*, 6 Eng. C. L. 555; *Phillips* v. *Allen*, 15 Eng. C. L. 269, is a well considered case to the full extent; *Ogden* v. *Saunders*, 12 Wheat. 358, so far as the American states are concerned, establishes the same rule.

Judgment affirmed.

IRA DAY *v.* RICHARD F. ABBOTT.

It is a good replication to a plea in off-set of a judgment recovered, that the whole judgment had been assigned to third persons, of which notice had been given to the judgment debtor.

In such case it is not necessary that the judgment debtor, in replying such assignment, should allege that the interest of the assignee is still subsisting. If the judgment creditor would avail himself of the ceasing of the assignee's interest, he must set it forth in a rejoinder.

A replication setting forth an assignment of part of the judgment to one, and the residue to another, is not double.

Quere, whether, if the whole legal interest had been assigned to one, the statement of another assignment would not be treated as surplusage.

Quere, whether, in an action on book, commenced before the revised statutes went into operation, a plea in off-set can be sustained.

THIS was an action of book account, commenced in February, 1840, in which there was a judgment to account, and reference to an auditor, who reported a balance due the plaintiff; which report was accepted by the court.

The defendant then plead in off-set a certain judgment in his favor against the plaintiff, rendered in April, 1837, on which he alleged there remained due, the sum of $209.80. To this plea the plaintiff replied that, on the 20th of November, 1839, the defendant, being indebted to one Chapin Keith in the sum of $200, in order to secure to the said Keith the said sum, and what he might thereafter owe him, transferred and assigned to him the whole amount due on said judgment, of which the said Keith, on the same day—

having possession of the execution issued on the judgment—gave notice to the plaintiff. And the plaintiff further replied that, on the 20th day of June, 1841, the defendant assigned to one Thomas Towne the same judgment, to secure to him the sum of $45 due him from the defendant—of which the said Town on the same day, gave the plaintiff notice. To this replication there was a demurrer, and joinder in demurrer; and for special causes of demurrer, the defendant, among others, assigned,

1. That the replication was double, in that it alleged that the defendant assigned to Keith the whole amount due on said judgment, and also that he had assigned the same to said Towne—thereby setting forth two separate and distinct matters of defence to the declaration in off-set, requiring separate and distinct answers.

2. That it was not alleged in the replication that said supposed incumbrances, set forth in said replication, were, at the time of filing the same, in full force, uncancelled and undischarged, or that said judgment was not, at that time, the property of the defendant.

3. That it was not alleged in said replication that, at the time of filing the same, Keith and Towne, or either of them, were the owners of, or had any interest in, or control over said judgment.

The court sustained the demurrer, and rendered judgment for the defendant; to which decision the plaintiff excepted.

N. Kinsman and L. B. Peck, for plaintiff.

A plea, in order to be available, must, as a general rule, rely upon facts that existed at the commencement of the suit. *Evans* v. *Prosser*, 3 T. R. 186. So, upon the same principle, if matter in off-set is relied upon, it must be a debt which was legally and equitably the property of the defendant when the action was commenced, as it is now the settled rule that courts of law will protect the rights of the assignee of a *chose in action*.

The replication sets up the fact that prior to the commencement of the present action, the defendant assigned and transferred the judgment sought to be off-set, to a third person. If the defendant had subsequently discharged that lien, and re-purchased the judgment, he should have replied that

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fact, instead of demurring. As the case stands, the court cannot allow the off-set without disregarding the rights of the assignee, and virtually overruling a series of adjudications by this court. *Strong* v. *Strong*, 2 Aiken 373; *Newell* v. *Adams*, 1 D. Chip. 346; *Lampson* v. *Fletcher*, 1 Vt. R. 168.

See also, *Makepeace* v. *Coats et al.*, 8 Mass. R. 451; *Ramsill* v. *Huntington*, 5 Day, 163; *Howe et al.* v. *Shepherd*, 2 Sumner, 409; *Satterlee et al.* v. *Ten Eyck*, 7 Cow. R. 480; *Raymond* v. *Squire*, 11 Johns. R. 47.

O. H. Smith, for defendant.

The first and fifth sections of Chap. 34, R. S. p. 212 and 13, authorize an off-set in an action on book, and direct the course of procedure in such cases.

The plaintiff's replication to the defendant's plea in off-set discloses no legal matter of defence. No precedent can be found for such a replication. It simply alleges that some third persons once had a conditional interest in the judgment and execution pleaded in off-set. It does not answer what it assumes to answer, and is therefore bad. 1 Chit. 509. It does not admit that Abbott ever had any cause of action, nor does it deny that it still exists. 1 Chit. 459. It is neither in avoidance, performance or discharge. 1 Swift's Dig. 617, 618. The plaintiff's replication is bad, for duplicity. 1 Chit. 511.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — This action was commenced in February, 1840, before the Revised Statutes went into operation. It is an action on book, and, after the account had been adjusted by auditors, the defendant plead in offset a judgment in his favor against the plaintiff, Day, recovered in April, 1837, on which was due, at the time the plea was filed, the sum of two hundred and ten dollars and thirty cents. To this plea the plaintiff replies that, before the commencement of this suit, Abbott, the defendant, was indebted to Chapin Keith in the sum of two hundred dollars, and to secure Keith for what was then due, and what should thereafter be due him from Abbott, he assigned and transferred the judgment to Keith, of which Keith, having the execution which

issued on the judgment in his possession, notified the plaintiff, Day, before the commencement of this suit; and that, on the 20th of June, 1841, he, Abbott, also assigned to one Towne the same judgment, to secure him for a debt of forty-five dollars which he, Abbott, owed Towne, of which, also, notice was given to Day. To this replication there is a demurrer.

At the time this suit was commenced, no provision was made by the statute authorizing a plea in offset in an action on book; and, from the mode of proceeding in such action, no such plea could be received. Provision was made, in other actions, where the defendant had an unliquidated account, that he might file a declaration on book and have the account liquidated, and then plead the sum, ascertained to be due, in offset. We are not prepared to say that the Revised Statutes, on this subject, could have any effect on actions then pending. When this suit was commenced, the plaintiff was not liable to be defeated by a plea in offset; and it is not readily perceived that the legislature could enable a party to avail himself of a defence, in a pending suit, which he could not have done prior to, and except by, the legislative enactment. But waiving the consideration of this question, we think the replication is a complete and sufficient answer to the plea in offset.

The object of the plea is to enable Abbott to obtain satisfaction of the judgment against Day out of the money found due from him to Day in the present action, and thus to collect and appropriate to his own use the judgment which he has once transferred and assigned to others, his creditors.

It is now well settled that courts of law, as well as courts of equity, will protect the rights of an assignee of a chose in action, and will not permit a person, after he has assigned a chose in action for a valuable consideration, to defeat it by any discharge which he may give; and, as a consequence of this, they will not permit a defendant to avail himself of any defence arising from any transaction between him and the plaintiff, or any discharge from the plaintiff, executed after the assignment. In the case of *Legh* v. *Legh*, 1 Bos. & Pul. 447, the court would not permit a defendant to plead a discharge from the nominal plaintiff, who had assigned the demand; and in the case of *Winch* v. *Keely*, 1 Term R. 619,

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where the bankruptcy of the plaintiff was plead in bar, a replication, setting forth that the suit, though in the name of the original party to the contract, was in reality for the benefit of another, was sustained. When the interest of the assignee cannot be given in evidence under the general issue, and in no other way can the interest of the assignee be protected, except by a replication, setting forth the transfer and assignment, such replication is good. The replication is, therefore, good in substance. It sets forth that Abbott had assigned the judgment, and had ceased to have any equitable interest therein. Day could not, after notice, avail himself of any defence thereafter to arise from any transaction between him and Abbott.

The state of the indebtedness between Abbott and Keith was not a subject to be investigated by Day. If Abbott had assigned his whole interest in the judgment, of which notice was given to Day, it was not necessary for Day to allege in his replication, that Keith or Towne had any interest in the judgment, at the time the plea was filed other than is alleged in the replication. If the judgment had ceased to belong to the assignee, and had been re-invested in Abbott, he should have set that forth, in a rejoinder.

The only question remaining is, whether the replication is ill for duplicity. Duplicity in a plea is fatal on a demurrer. Surplusage is not, though it may sometimes embarrass the party by requiring him to prove facts set forth, which would otherwise be immaterial. The weight of authorities is, that matters immaterial cannot operate to make a plea double. I am rather inclined to the opinion, that the statement of the assignment to Towne was immaterial and surplusage. But as Abbott may be considered as having a remaining interest in the judgment, after the assignment to Keith, of ten dollars, the two assignments may be considered as one entire transaction, parting with his *whole* interest in the judgment, and both together, as constituting one connected and entire proposition. In either view, the replication is not liable to the objections raised against it. The other special causes of demurrer have not been urged in argument, and do not appear to be substantial. The objections to the plea in offset are considered as fatal. The judgment of the county court is re-

versed, and judgment must be entered that the replication is sufficient, and for the plaintiff to recover the sum found due by the auditor.

MOSES PECK *v.* FRANKLIN W. THOMPSON and CHARLES THOMPSON.

No objection for variance between the declaration and proof which was not raised in the county court, and which might there have been obviated by amendment, will be sustained in the supreme court when revising the case on exceptions, unless the variance is apparent upon the face of the exceptions, and is of such a character that the judgment, if affirmed, would not protect the parties in reference to the matter actually litigated.

A. owed B. and sent him with a verbal order to procure the money from C. on A.'s account. C. refused to pay upon a verbal order, and required B. to bring a written order from A, or else to give his own accountable receipt for the money. B. received the money and gave his receipt to account to C. for it on demand. Afterwards C. called on B. and threatened to commence a suit upon his receipt. Of this B. notified A., relying upon him to settle the demand of C. A. claimed that he had already paid it to C, in discharge of B. And to induce B. to submit to a suit in favor of C, and thereby afford A. an opportunity to prove such payment, A. and D. promised to indemnify B. against any judgment which C. might recover, as also against the expense of defending C's suit. *Held*, that the promise of A. and D. was not affected by the statute of frauds.

ASSUMPSIT in several counts, but the one on which the plaintiff relied, was as follows: —

"Also, in a further plea of the case for that whereas, heretofore, to wit, on the 16th day of November, 1836, there was pending in the county court, then sitting at Montpelier, within and for the county of Washington, an action of assumpsit on an accountable receipt, in favor of John Campbell, jr., against Moses Peck, the present plaintiff, which said receipt, and the matters in controversy in said suit, the defendants in this suit were equitably bound to settle, pay, and take up. And the said defendants so being equitably bound to settle, pay and take up said receipt, and to settle the matters in controversy in said suit, in the month of November, 1836, to wit, on the 16th day of said month, promised and agreed with the plaintiff in this suit, that if he, the said Peck, would defend the said suit, so pending, as aforesaid, in favor of said

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Campbell, against said Peck, if the said Campbell should recover a judgment in said suit against said Peck, that they, the defendants, would settle, and pay the said judgment, and also pay to the said Peck, all costs and expenses that should accrue in the defence thereof. And the plaintiff saith, that, relying upon the promise and agreements of the said defendants, he did defend said suit in said court, and that a final judgment was rendered therein against the present plaintiff, at the April term of said court, A. D. 1837, in favor of the said Campbell, for the sum of ninety dollars and sixty-four cents, damages, and twelve dollars and ninety-four cents, costs of said suit. On which judgment an execution issued against said Peck, on the 19th day of April, 1837, for the sums aforesaid, and twenty-five cents for execution, and he, the said Peck, was afterwards arrested thereon, and committed to prison, and compelled to, and did, pay the said judgment and execution, so recovered and issued, as aforesaid, together with two dollars and forty-nine cents, officer's fees on said execution. And the said Peck expended a large sum, to wit, seventy dollars, in the defence of said suit; of all which the defendants had notice.

Yet, though often requested, the plaintiff says that the defendants have not paid nor settled said judgment, or paid either of said sums, or any part thereof; but wholly neglect and refuse so to do."

The cause was brought into this court upon the following bill of exceptions: —

This was an action of assumpsit, as per writ and declaration referred to, and made a part of the case. Plea, the general issue. Trial by jury.

It appeared that the defendant, Franklin W. Thompson, in the spring of the year 1835, commenced doing business in Montpelier as a confectioner, and conducted and continued said business until the month of October, of the same year, and was solely interested in the same. In the month of September, 1835, the plaintiff supplied the said Franklin W. with sugar, to the amount of about $177, and the plaintiff received cash, and a verbal order on one John Campbell, jr., for $88, in settlement for the same. When the plaintiff called upon the said John Campbell, jr., for said sum of $88, he declined paying the same, without a written order, unless

plantiff would give his receipt for the same, to account for; whereupon, the plaintiff gave the said Campbell his receipt of the following tenor: "Sept. 5, 1835. Received of John Campbell, jr., $88, to account for on demand." In the spring or summer of 1836, the plaintiff notified Franklin W. who was then residing in New-Hampshire, with his father, Charles Thompson, that he was threatened with a suit, and about to be sued, on said receipt, and requested the said F. W. to pay, and take up the same; to which the said F. W. replied, that he had allowed the amount to Campbell in his settlement with him, and said he could show it. The said Charles Thompson asserted the same, and there was evidence tending to show that both the defendants then, and at other times, promised the plaintiff that if he would defend the suit which Campbell should commence, they would see him clear and harmless from all damages and costs. The plaintiff defended the suit of the said Campbell, and a judgment was rendered against him for the sum of , damages, and , costs of said suit; upon which execution issued, and the plaintiff's body was arrested, and committed thereon, and he compelled to pay the same. To recover which, and counsel fees, and other expenses incurred in said defence, the plaintiff commenced this suit.

The court charged the jury, that if, under the circumstances before detailed, they found that the defendants, Charles Thompson, with his son, F. W. Thompson, jointly promised the plaintiff, that if he would suffer a suit, and defend against the receipt he had given Campbell, and in case he, the plaintiff, did not succeed in the defence, they would pay all cost and trouble, and take up said receipt, then the plaintiff would be entitled to recover the full amount of the receipt, costs and trouble; or in other words, the judgment obtained by by Campbell, of the defendants; although there was no promise in writing by either of the defendants.

To all which defendants excepted; and after, verdict for plaintiff, moved the court in arrest of judgment. Which motion was overruled, and defendants excepted to that also.

Exceptions allowed and execution stayed, &c.

Dillingham, *Heaton* and *Kinsman*, for defendants.

1. The case shows that the orignal claim of *Campbell* v.

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Peck, was the sole and undisputed debt of F. W. Thompson to pay.

2. The promise proved was, if plaintiff would resist that claim, and was unsuccessful, defendants would pay the original debt and all costs and expenses.

We think there was a fatal variance between the declaration and proof; the declaratian alleges that defendants were equitably and legally bound to pay the Campbell claim, when the proof does not show the shadow of obligation on the part of Charles Thompson previous to the joint promise proved on trial. *Bristow* v. *Wright*, Doug. 640; *Smith* v. *Taylor*, 1 N. R. 210; Stark. Ev. 1552, n. *x*.

If the plaintiff is not entitled to recover against both of these defendents, then he can recover against neither; so that we may consider this case as though the action was against Charles Thompson, and the same promise proved against the two, as made by him alone.

That part of the promise which bound him, in case of recovery against Peck by Campbell, to pay the amount of that receipt, was clearly an undertaking for the debt, default or miscarriage of another, and so within the statute of frauds. Defendant's undertaking, then, was entire, and a part of it was void by the statute of frauds.

If a promise is entire, and a part of it is void, under the statute of frauds, there can be no recovery on it, as the whole is void. Chitty on Contracts, 206, 230; *Van Alstyne* v. *Wimple*, 5 Cowen's R. 162; *Charter* v. *Beckett*, 7 Term R. 201; *Loomis* v. *Newhall*, 15 Pick. R. 159; *Turner* v. *Hubbell*, 2 Day, 457; 8 Johns. R. 29.

There are other cases strong to this point. In *Lexington* v. *Clark & wife*, 2 Vent. 223, the plaintiff had demised lands to the former husband of the wife, defendant, and in consideration that the plaintiff would permit her to have the premises until Lady-Day then next, and permit her to remove certain fixtures, she promised the plaintiff to pay £160 for the rent arrear, and £260 more. She paid the £160, which was within the statute, and plaintiff sued for the £260, which was for her own occupation. But the whole court decided that the promises being void for one part, could not stand good for the other; saying "it is an entire agreement, and the action is brought for both the sums, and, in-

deed, could not be otherwise without variance from the promise."

So in the case of *Featherston* v. *Hutchinson*, Cro. Eliz. 199. There the plaintiff had arrested the body of one H. on execution at the suit of J. S. The defendant promised plaintiff to pay him the money which J. S. was adjudged to pay. The promise as to the first consideration was void by statute 23 Henry VI. chap. 12, being for ease and favor; and although that was joined with a good consideration, to wit, the two shillings—yet it was held by the court that the promise being void for a part, was void for the whole.

Indeed, it would seem that if this suit were to recover the expenses of defending Campbell's suit, alone, even in that case, the promise would come within the statute of frauds. 2 Esp. R. 484. Comyn on Contracts, 69.

Upham & Vail, for plaintiff.

Two questions are presented for discussion by the bill of exceptions allowed in this case. 1. Is the promise declared upon within the statute of frauds? and 2. Is the declaration sufficient to sustain a judgment for the plaintiff?

I. As to the statute of frauds. The promise declared upon is, we insist, an original undertaking founded upon a new and distinct consideration, independent of any debt due plaintiff, and one moving between the parties to the new promise, and consequently not within the statute. *Tomlinson* v. *Gill*, Amb. 330; *Williams* v. *Leper*, 3 Burr. 1886; *Leonard* v. *Vredenburgh*, 8 Johns. Rep. 29; Roberts on Frauds, 232 to 237. Where there is a pre-existing debt, or other liability, it is said, a promise to pay by a third person, having immediate respect to, and founded upon, such debt or liability, without any new consideration moving to him, is a collateral undertaking, and is within the statute. But where, distinct from the original liability, there is a superadded consideration for the promise, moving between the party making it, and him to whom it is made, the undertaking is an original one, and is not within the statute. 7 Harris & Johns. 391; Chitty on Con. 5 ed. 507, n. 2.

The words of the statute are "no action shall be brought to charge any person, upon any special promise to answer

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for the debt, default or miscarriage of another; unless the promise, contract or agreement, upon which such action shall be bronght, or some memorandum or note thereof, shall be in writing," &c. Statute, 316, 317.

In the case at bar, as between the plaintiff and defendants, what promise is there as to the debt, default, or misdoings of another? Franklin W. Thompson was under no legal obligations to defend Campbell's suit against the plaintiff; consequently it cannot be said that the promise declared upon is a promise to answer for the debt, default, or misdoings of Franklin W. in relation to the defence of that suit. If the third party be not by law liable for the demaad, the defendant's promise cannot be considered collateral, and need not be in writing. *Harris* v. *Huntbach*, 1 Burr. 373; 3 Bac. Ab. 595; *Loomis* v. *Newhall*, 15 Pick. 159, 170; Chitty on Cont. 5 ed. 515.

The defendants contended, when they made the promise declared upon, that there was no debt due plaintiff from F. W. Thompson. They insisted that the $88, for which Campbell threatened to sue plaintiff, had been allowed him in a settlement with F. W. Thompson, and they could prove it; and for the purpose of giving them an opportunity to make the proof, they desired the plaintiff to suffer the suit and defend it.

This case, we think, cannot be distinguished in principle from *Adams* v. *Dansey*, 19 E. C. L. R. 149, where the plaintiff, an occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes; and it was held by the court that it was not a promise required by the statute of frauds to be in writing. 12 Mass. 297; 1 New R. (4 Bos. & Pull.) 124; 2 East, 325.

The suit in favor of Campbell against the plaintiff was suffered and defended, at the request, and for the benefit of the defendants. The plaintiff had no interest in its defence, and would not have suffered it to proceed to trial, but for the promise of the defendants.

But it is now said by the defendants, that Franklin W. Thompson owed the plaintiff a debt of $88, at the time the promise was made, and therefore, it is within the statute. The promise is not to pay the debt due from F. W. Thompson to the plaintiff, but to see him clear and save him harmless from all the consequences of Campbell's suit.

It has been frequently held that a parol contract is not invalid, where the party making the promise has assumed some other duty, and not the payment of the very debt which was due from the third person. *Reid* v. *Nash*, 1 Wils. 305; *Harrington* v. *Rich*, 6 Vt. R. 666, 673; and it makes no difference, where the promise is founded on a new consideration, that its performance would have the effect of discharging that demand and releasing that person. *Williams* v. *Leper*, 3 Burr. 1886; 2 Wils. 308; *Bampton* v. *Paulin*, 4 Bing. 264; Chitty on Cont. 5 ed. 512, 513.

So in this case, if there was a debt of $88, due from F. W. Thompson to the plaintiff, and the successful defence of Campbell's suit would have discharged it, the promise is not within the statute, because it was not to pay the very debt due the plaintiff.

But again, if the plaintiff had succeeded in his defence to the Campbell suit, the defendants would not have been discharged from their promise; they would have been liable for the cost and expense of the defence.

II. As to the declaration. If there is any defect in the declaration, which would have been a fatal objection on demurrer, it is cured by the verdict. We insist, however, that it is in no way defective.

The opinion of the court was delivered by

ROYCE, J. — The motion in arrest has not been urged in the argument, and will, therefore, be passed without remark.

There are two particulars in which the evidence on trial varied from the averments in the declaration: — One in reference to the alleged equitable obligation of both these defendants to settle and pay the claim of Campbell; and the other in relation to the alleged fact that Campbell's suit against the plaintiff was pending when the defendants made the promise declared on. It might be sufficient to remark, that the former allegation can only be regarded as inducement to the promise, and that the latter is immaterial. But there is another ground upon which, in this stage of the case, the objection must fail. The point of variance does not appear to have been raised in the court below; and comes incidentally to our notice on comparison of the declaration with the

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bill of exceptions. And since these variances could neither affect the intrinsic merits of the cause, nor the validity of the judgment, they are not to be regarded in revising the case upon exceptions. Indeed, no objection on the ground of variance, which was not raised in the county court, and which might there have been obviated by amendment, should be sustained in this court, unless the variance is both apparent upon the record, and of such a character that the judgment, if affirmed, would fail to protect the parties in reference to the matter actually litigated.

It is objected that the promise on which the plaintiff recovered, was void as against the defendant, Charles Thompson, under the statute of frauds, because not evidenced by writing. The objection assumes that Franklin W. Thompson was under a previous obligation to pay Campbell's demand against the plaintiff; so that the promise of the two defendants, on which this action is founded, was a promise, on the part of Charles Thompson, to answer for the debt of another. Without entering into the question discussed at the bar, whether, admitting the fact assumed, the objection would be removed by the object and terms of the promise, (it being a promise to indemnify against the claim of Campbell, and not expressly to pay it) it will be sufficient to determine the correctness of this assumption, which is the basis of the whole argument against the validity of the promise declared on.

The case finds that Franklin W. Thompson owed the plaintiff $177.00; that they met to adjust that demand, when the plaintiff received of Thompson a sum of money, and a verbal order on Campbell for the balance, being $88; that when the plaintiff resorted to Campbell for the $88, he refused to pay the money on a verbal order, and required the plaintiff to procure a written order from Thompson, or to give his own accountable receipt for the money. The plaintiff took the latter course, and obtained the money on his own receipt, to account to Campbell for it on demand. It is clear that by this transaction the balance due from Thompson to the plaintiff was not paid, but the latter contracted a debt of equal amount to Campbell. It was doubtless contemplated that Thompson would pay the debt to Campbell, and thus discharge his own debt to the plaintiff; but in the

mean time the two debts were actually distinct and independent. Nor does the case disclose any distinct undertaking on the part of Thompson to make payment to Campbell. In this condition of things Campbell demanded payment of the plaintiff, when Thompson insisted he had paid Campbell for the plaintiff. The two defendants, thereupon, requested the plaintiff to suffer a suit by Campbell, and thus afford Thompson an opportunity to prove his alleged payment; in consideration whereof they made the promise declared on. This agreement did not immediately relate to any debt of Thompson, but to a disputed claim which Campbell asserted against the plaintiff. And the consideration for the agreement originated entirely between the present parties; Campbell was a stranger to it, as he was to the agreement itself. We are, therefore, satisfied that the case is not at all affected by the statute of frauds.

Judgment affirmed.

DAVID HILL *v.* BENJAMIN DUNLAP.

If one commences a suit by process which is defective, he may discontinue it, and bring fresh suit; and the second suit will not be considered vexatious.

In such case, the former suit may be discontinued by oral notice to that effect.

The only use of written notice in such cases, is, to prevent the defendant's claim of costs, for attending at the time and place of trial, in the discontinued suit.

THIS was an action of trespass, appealed from a justice of the peace to the county court. The defendant pleaded in abatement the pendency, at the commencement of the present suit, of another suit for the same cause of action. The plea was traversed, and issue joined to the court. On trial, it appeared that this suit was commenced by writ, issued by Azel Spalding, justice of the peace, on the 15th of March, 1842, returnable before him on the 21st, and served on the defendant on the 15th; that there had been a suit for the same cause of action, commenced by writ, issued by Homer W. Heaton, justice of the peace, and returnable before him on the same 21st of March, and served on the defendant

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previous to the issuing of the writ in the present case; and that it had been proved in the trial of this suit, before the justice, by the testimony of the individual who served the writs in both cases, "that he came out of Roger's tavern 'with Dunlap, and told him that the old case was discon-'tinued, and that they had got a new writ for him, and that 'he then read to the defendant the second writ, and he '(the defendant) went and got bail."

The court decided that it did not appear that any such suit was pending at the commencement of this suit, as would abate the same, and rendered judgment for the plaintiff; to which the defendant excepted.

J. A. Vail and *W. K. Upham*, for defendant.

I. We insist that Willard had no authority to give the notice to Dunlap. To authorize him to give the notice, there must be something more than his deputation to serve and return the writ. *Wainwright* v. *Webster*, 11 Vt. R. 576.

II. If Willard was authorized to give the notice, the plaintiff can derive no benefit from it, unless the first suit was in fact discontinued. Again: The notice should have been explicit and certain, so that no advantage could have been taken of the defendant if he had relied upon it.

III. The notice should have been in writing, and signed by the plaintiff or his attorney. Verbal notice was not sufficient. *Wright* v. *Doolittle*, 5 Vt. R. 390. The reason of the rule, that the pendency of a suit will abate another action, for the same cause, and between the same parties, is, that the second suit is unnecessary and oppressive. *Morton* v. *Webb*, 7 Vt. R. 124.

If the first suit had been discontinued before the entry of the suit at bar, it would not help the plaintiff. "On principle, the second suit is vexatious, if the first one were pending at the time the second one was commenced." *Parker* v. *Colcord*, 2 N. H. R. 36.

O. H. Smith, for plaintiff.

1. In this case the county court have found the fact that no such suit was pending at the commencement of the present action, as would abate the same; or, in other words, that the suit described in the defendant's plea was not pend-

ing at the commencement of the present action. A fact found by the county court cannot be a subject of inquiry in the supreme court. *Kirby* v. *Mayo*, 13 Vt. R. 103. The case is to be viewed as strictly a matter *in error*; and if a writ of error would not be sustained, this court will not reverse the decision of the county court, for this court cannot revise the questions of fact which were settled below. *Way* v. *Wakefield*, 7 Vt. R. 223.

2. If it can be said that the case presents any question for this court to decide, it can only be, whether a suit once commenced, can be discontinued by the act of the plaintiff, by giving notice to the defendant. We contend that the plaintiff in any action may discontinue the same by giving notice. The service of a writ is considered as the commencement of a suit, in general. The object of the service of process is to give notice to the defendant to appear in court. It would be absurd to say that the notice could not be countermanded. See *Haskell* v. *Whitney*, 12 Mass. 47; *Mead* v. *Armes*, 2 Vt. R. 180. No case can be found, it is believed, establishing a doctrine so inconvenient and mischievous in practice, as the one contended for by the defendant.

The opinion of the court was delivered by

REDFIELD, J. — The only question reserved in this case is, whether the county court decided correctly upon an issue of fact, joined to them, upon the traverse of a plea in abatement, of the pendency of a former suit, at the time the writ in this action was served.

The suits must have been both pending at the same time, or there is no ground of pleading in abatement, on that account. If that is not the case, there is nothing vexatious. If they were both pending at the same time, the former suit will abate the latter, but not *vice versa*. In this state, we have adopted the rule, which obtains in Connecticut and some of the other states, that if the party bring a defective suit, he may, upon discovering the defect, discontinue that suit, and bring another, and this shall not be considered vexatious. And if the party gives notice of discontinuance, and brings fresh suit, in the absence of all proof to the contrary, it will be presumed to have been for defect in the former

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process, else he could have had no motive for the proceeding.

As this was an issue of fact, joined to the county court, we cannot well revise their decision, unless the testimony was illegal, or of a degree which was inadequate. For, if the testimony was of a quality to have been submitted to a jury, the finding of the county court upon it is not subject to reversal here. Hence, although it might be argued that the person giving the notice was not authorized so to do, yet, if the parties acquiesced in his authority, they being present or near at hand, when the fact of his authority might have been easily inquired into, the county court might well have inferred he had such authority. The same may be said in relation to the terms in which the notice was communicated. It is true they were rather indefinite, but no doubt in regard to their import being expressed at the time, it might be a fair inference that they were, in fact, understood by the defendant as referring to the former suit.

The only question, then, which arises in this case, is, whether notice of discontinuance, being without writing, makes the second suit vexatious. There is no other case in which it has ever been held, that there was a necessity for notice of discontinuance to be in writing, except to prevent a claim for costs, under the statute, which provides, that, if the party shall discontinue his suit, he shall be liable to pay the other party "reasonable costs." And the decision to this extent is rather *making* law, perhaps, and should not be extended. But even when the party gives notice, orally, of discontinuing his suit, the suit is none the less discontinued, because the other party may be entitled to costs. It is a matter of discretion with the court when costs shall be allowed. They have said they will not allow them when notice is given in writing. But if the notice is oral, the suit is none the less discontinued, and if the party thereafter proceed in it, and take judgment as by default, he will be liable to have it set aside by *audita querela*. If the defendant have incurred costs which are not tendered, he will be entitled to claim them; and so, for the costs of attending at the time and place of court, if no writing is given for his protection. Still the former suit was discontinued from the time of the notice; and had the party, after receiving such notice, disregarded

it, and summoned witnesses, he could not recover for their attendance or travel. And this second suit is not, in any sense, to be considered vexatious, because the notice was not in writing, especially when the defendant asked no writing for his security, and did not object to the sufficiency of the notice. Judgment affirmed.

PHEBE GRANT *v.* WILLIAM PARHAM.

A widow may bar her claim to dower in a particular lot by a quit-claim deed thereof, executed before her dower has been assigned, in which she covenants that she will have and claim no right to the quit-claimed premises.

THIS was an action of ejectment for about twenty acres of lot No. 11, in the 12th range in the town of Berlin. Plea, not guilty, and trial by the court.

It was admitted, on trial, that the plaintiff was entitled to recover, unless defeated by the following facts. Azariah Grant, the husband of the plaintiff, died, seized and possessed of the premises in question, in the month of April, 1825. On the 14th of October of the same year, the plaintiff conveyed, by deed of quit-claim, executed in due form of law, all her right and interest in, and to, the whole of said lot No. 11 — more particularly her right of dower—to one Edward Brown, under whom the defendant claimed title; covenanting, in said deed, that she would have and claim no right in or to the quit-claimed premises. On the —— day of ————, 1826, the plaintiff petitioned the probate court that dower might be assigned her out of that part of the said lot, of which her husband died seized. A committee was appointed, who set out the premises in question, which were duly assigned to the plaintiff, as dower, on the 14th of July, 1826.

Upon these facts the court rendered judgment, *pro formâ*, for the plaintiff; to which decision the defendant excepted.

H. W. Heaton & C. Reed, for defendant.

I. The first question arising is, whether the plaintiff had, before her dower was "set out and ascertained," such an interest in the estate as could be legally conveyed.

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By the common law, and the laws of most of the states of the Union, the widow is entitled to dower of the third part of such lands and tenements as were the husband's, in fee, at any time during the coverture. After the death of the husband, the widow's *right* to dower is said to be consummated; but, at common law, and in those states where the statutory provisions are in accordance, the current of authorities go to show that this right rests in action. By the assignment, the widow acquires no new freehold, but holds, in continuation, the husband's estate, and by relation, is considered as holding from the time of his death.

Vermont and Connecticut are the only New England states in which the common law rule has been departed from. In both these states the widow is entitled to one third part of the real estate of which her husband died seized, as dower. Dower, then, by peculiar institution in these states, is something different from dower at common law, as is evident by the practice in both, and judicial decision in the latter. The statutes of the two states are the same in substance and differ but little in phraseology. Slade's R. S. 347, §71 & 72; Conn. R. S. title, Dower, 180.

It has been held in Connecticut that the estate in dower, after the death of the husband, immediately vests in the widow, in common with the heirs; and the assignment is a mere severance of the common estate, and only secures the right, which was as complete before as after. 1 Swift's Dig. 85; *Stedman & Gordon* v. *Fortune*, 5 Conn. 462.

If the statute of 1821, in force at the time of the plaintiff's conveyance, should receive a similar construction, it would follow, by necessary implication, that the plaintiff had an interest in the estate, subject to sale and transfer.

II. It is insisted that the plaintiff's deed of release should bar her from a recovery in her own right, even admitting that, at the time of executing the same, she had merely a right of action. *Cox* v. *Jagger*, 2 Cow. 638; *Jackson* v. *Vanderhaven*, 17 Johns. R. 168; *Jackson* v. *Aspell*, 20 Johns. R. 413.

This right may be lost, without the formality of a conveyance; as, for instance, by an award. 2 Cow. 638. So by a written agreement in pursuance of an award. *Shotwell* v. *Sedem's heirs*, 3 Ohio R. 5. So a widow will be barred,

if she assent that the estate in which she is entitled to dower, shall be sold free from dower. *Smiley* v. *Wright et al.*, 2 Ohio R. 506. "The baron makes a lease for life and dieth; the release made by the wife of her dower, to him, in reversion, is good, albeit she hath no cause of action against him *in presenti*." Co. Litt. 265, a. By the custom of London, a married woman may bar herself of dower, by a deed of bargain and sale. 1 Cruise's Dig. 139, sect. 18.

In those states where dower is allowed in all the lands of which the husband was seized during coverture, the feme covert may bar herself of dower, by joining in a deed with the husband. In Massachusetts, this practice has been referred to New England common law. *Fowler* v. *Shearer*, 7 Mass. 20. In New Hampshire, the wife may release alone. *Ela* v. *Card*, 2 N. H. R. 175, 176.

III. The plaintiff is estopped, or concluded, by her deed of release to Brown, under whom the defendant claims, for when a person has conveyed land, he will not be permitted, afterward, to claim, in opposition to his own deed, although the deed may not amount to an estoppel. *Jackson* v. *Stevens*, 16 Johns. R. 110. If a man make a lease of land, by indenture, which is not his, or levies a fine of an estate not vested, and he afterwards purchases the land, he shall, notwithstanding, be bound by his deed, and not be permitted to say that he had nothing. *Jackson* v. *Bull*, 1 John. C. 98; *Jackson* v. *Murray*, 12 John. R. 210; *Trevivan* v. *Lawrence*, 1 Salk. 276; 2 Mod. 115; 6 Mod. 258; Co. Litt. 45, a. 47; b. 252, a. b.

L. B. Peck, for plaintiff.

1. On the death of the plaintiff's husband, the title to his real estate vested in his heirs. Until the assignment of dower, her interest was a mere *chose in action*. Her deed, therefore, to Brown, did not pass to him any legal interest or title to the land. Were he one of the heirs to the estate, possibly the conveyance might have operated as a release of her interest; but he being a stranger, it cannot have that effect. 1 Cruise's Dig. 131, Tit. 6, chap. 4, sect. 1; Walk. on Conv. by Merifield, 41; *Tompkins* v. *Fonda*, 4 Paige, 448; *Siglan* v. *Van Riper*, 10 Wend. 414; *Ritchie* v. *Putnam*, 13 ib. 524; 4 Kent's Com. 60; *Nutt* v. *Nutt*, 12 Com. L. R. 205; *Rex* v. *Inh. of Bassett*, 9 Com. L. R. 232.

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2. The plaintiff's title, as tenant in dower, having been perfected by a subsequent assignment of dower, does not aid the defendant. The conveyance from the plaintiff to Brown being a mere release, the title does not enure to the benefit of her grantee. Had the conveyance been a warrantee deed, the case would have stood on a different ground, as in that case she would have been estopped from claiming title. It is, probably, on this ground, that it is held a *feme covert* may be barred of her dower by joining with her husband in a conveyance of his estate, when that conveyance is with warranty. No case, it is believed, can be found where she has been held barred, when the conveyance was a mere quit-claim. A quit-claim, however, may have that effect, as it would operate as a release to the grantee, he having the reversionary interest, by the conveyance from the husband. *McCracker* v. *Wright*, 14 Johns. R. 194; *Jackson* v. *Hublee*, 1 Cow. 613; *Dart* v. *Dart*, 7 Conn. R. 250; *Doe* v. *Tompkins et al.*, 11 East, 185.

Judge Story, however, is of the opinion that the practice which has prevailed in this country, especially in Massachusetts, of the wife releasing her dower, by joining with her husband in a conveyance, took its origin from the *Colonial* act of 1644. *Powel* v. *Monson*, 3 Mason 351.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — It is admitted the plaintiff must recover in this case, unless she is prevented by her deed, executed on the 14th day of October, 1825, after the death of her husband. In that deed she conveyed, by quit-claim, all her right and interest in lot No. 11, and particularly her right of dower, to one Brown, under whom the defendant claims. Her dower was not, at that time, assigned to her, but afterwards, on the 14th of July, 1826, was duly assigned to her, and contains the land sued for. By the statute, the widow is entitled to dower in one-third part of the real estate of which the husband died seized. At common law, she had a right of dower in all the estate of which her husband was seized, during coverture, which any issue she might have had by him could, by any possibility, inherit.

In New England, where the rule of the common law prevailed, it was always considered that the wife might relin-

quish, in the lifetime of the husband, by joining with him in a deed. This was not because she was estopped by any covenants contained in the deed of herself and husband, as she was incapable of entering into a covenant, but because she was considered as having such an interest as she could release and convey to the grantee of her husband. At common law, she could release her right of dower, though she could not invest another with a right to maintain an action for it. 1 Cruise, 159; *Jackson* v. *Vanderheyen*, 17 Johns. R. 168.

In Connecticut she is considered as having, after the death of the husband, a vested interest in common with the heirs, which does not depend upon her dower being set out; and, although our statute is similar to the statute of Connecticut, it is not necessary for us to say whether the same rule would be here recognized, or that, before assignment, she could either maintain or defend an action of ejectment, simply on her right of dower, without any assignment. But in any view of the subject, whether she is considered as having only a right of action, or a vested interest, she may bar herself of her right of dower in any particular lot, by deed executed after the death of her husband. Moreover, by the deed which she executed to Brown she covenants with him, his heirs, and assigns, that, from and after the executing the deed, she would have and claim no right in or to the remised, released, and quit-claimed premises. By the deed and the covenant therein, she is estopped from setting up any claim of dower in the premises thus conveyed. The judgment of the county court is reversed, and a new trial granted.

ANDREW CUMMINGS *v.* OLIVER CLARK, ORRIN SMITH, SHEFFIELD HAYWARD, JR., AND ROBERT JOHNSON.

The refusal of a highway surveyor to execute a receipt for a tax bill, does not vacate his office.

The selectmen have no authority to make a new appointment to any town office, unless a vacancy occurs, in one of the modes specified in the statute.

A person not duly appointed to an office, cannot justify his acts on the ground that he was an officer, *de facto*.

WASHINGTON, *March*, 1843.

Cummings v. Clark *et al.*

TRESPASS for a cow. Plea not guilty, with notice of special matter. Issue joined to the court.

The plaintiff, in support of the issue on his part, proved that he was the owner of the cow, and that the defendant Clark, by the direction of the other defendants, took and drove her away.

The defendants, in support of the issue on their part, proved that the said Orrin Smith, Sheffield Hayward, Jr. and Robert Johnson, were, at the annual March meeting in Berlin, in 1841, duly elected selectmen of said town; that, as such selectmen, they made out a legal highway tax bill for highway district No. 2, in said Berlin, and on the first day of June, A. D. 1841, presented the same, accompanied by a legal warrant for the collection of said tax, to Thomas Spear of said Berlin, who was, at the annual March meeting aforesaid, duly elected highway surveyor for said district No. 2, and requested him to receive said tax bill and warrant and give his receipt for the tax bill; that the said Spear refused to receive said tax bill and give his receipt therefor, but offered to receive it without giving a receipt; that the selectmen aforesaid refused to deliver him the said tax bill, unless he would receipt it. It appeared that the plaintiff was an inhabitant of said Berlin, and resided within the limits of said highway district No. 2, and was taxed on the said tax bill, the sum of $ ———. The defendants, in further support of said issue on their part, proved that said selectmen on the 3d day of June, A. D. 1841, adjudged that the refusal of the said Spear to receive said tax bill, and give his receipt therefor, created a vacancy in said office of highway surveyor, and made a temporary appointment of the defendant, Oliver Clark, of said Berlin, and an inhabitant of said highway district No. 2, to fill said vacancy; and said appointment was duly recorded in the town Clerk's office in said Berlin on the said 3d day of June, A. D. 1841. The defendants further proved that the said Clark accepted said appointment, and received said tax bill and warrant and gave his receipt therefor, and proceeded, as the law directs, in the collection of said tax; that the plaintiff refused to pay his said tax, and the said Clark, by virtue of his said warrant, distrained the cow described in the plaintiff's declaration, and sold her at public vendue for the payment of said tax. The defendants

further proved that said Clark proceeded in all things as the law directs, in distraining, and disposing of said cow.

It was further proved by the plaintiff, that the said Thomas Spear accepted the office of highway surveyor of said district No. 2, and was duly sworn.

Upon these facts, the court decided that the plaintiff was entitled to recover the value of the cow, and adjudged that he recover of the defendants the sum of $26.12 damages and his costs; to which decision the defendants excepted.

W. Upham, for defendants.

1. The selectmen of Berlin acted judicially in adjudging the office of highway surveyor for district No. 2, vacant; and the validity of their "temporary appointment" cannot be called in question here. *Vide* statute, p. 88, sec. 20, 21; *The King* v. *Forrest et. al.*, 3, Ter. 38, 40; *The King* v. *Inh. of Hamstoll*, 3 Ter. 380.

By the 21st sec. of the statute, the selectmen are authorised to fill a vacancy in the office of highway surveyor, by a "temporary appointment," which is to become a matter of record in the town clerk's office. Such vacancy, the statute says, may happen by insanity; consequently the selectmen must decide upon the question of insanity; and in making the decision they act judicially, and their proceedings cannot be impeached, or called in question, in this collateral manner. *Groenvot* v. *Burvell*, 1 Salk. R. 396; *Harman* v. *Tappenden et. al.* 1 East. R. 556; *Drewe* v. *Coulton*, id. 563, n. *a*; *Strickland* v. *Ward*, 7 Ter. R. 633, n. *a*; *Mather* v. *Hood*, 8 Johns. R. 50; *Jenkins* v. *Waldron*, 11 Johns. R. 114; *Bigelow* v. *Stearns*, 19 Johns. R. 39; *Yates* v. *Lansing*, 5 Johns. R. 282; 9 do. 395. We do not contend that the selectmen of a town are clothed with any general judicial authority; but in some things, we insist, they act judicially; and while they so act, are not responsible for errors of judgment; and their proceedings are as conclusive as the proceedings of courts of record. *Henderson* v. *Brown* 1 Caine's R. 92, 102; *Wickwire* v. *Bryan*, 11 Wend. R. 545; do. 90; *Tompkins* v. *Smith*, 8 Wend. R. 462.

2. If the selectmen erred in the exercise of their powers, their proceedings are not void, but voidable; and being only voidable, the defendants can justify under them. *Horton* v.

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Archmoody, 7 Wend. R. 200; *Butler* v. *Potter*, 17 Johns. R. 145.

Again: the doings of an officer who is *de facto* such, are good, and his right to exercise the duties of the office can only be inquired into, on *quo warranto*. *Rex* v. *Carter*, 1 Cowp. 220; *Buckman* v. *Ruggles*, 15 Mass. R. 180; 7 Comyn's Dig. 190, 191, (A); 1 Swifts Dig. 167.

3. The selectmen, we insist, were right in making the "temporary appointment," inasmuch as Spear refused to receive the tax-bill and give his receipt for it. Stat. 135 § 6.

L. B. Peck, for plaintiff.

I. There was no vacancy in the office, in the case in question. *Spear* was appointed surveyor by the town, at its March meeting, and accepted the trust. His refusal to give a receipt for the tax bill did not create a vacancy in the office. The statute which provides that the surveyor shall give a receipt is merely *directory*. (R. S. p. 136 sec. 6.) The same section requires that the selectmen shall deliver the taxbills to the several surveyors by the first day of May; and there would be the same force in the argument that the office of the selectmen was vacant, or that the surveyor was not bound to receive the taxbill, because they had omitted to deliver it by the time designated, as there is in the position assumed, that Spear's refusal to execute a receipt created a vacancy in his office. A mere *neglect* of some official duty, in no case, makes a vacancy in the office, unless there is some statute declaring it such; and it is not claimed that there is any such statute in the case at bar. The 20th sec. of the 13 ch. R. S. provides that non-acceptance, death, removal, insanity or other disability of the person chosen to office, shall constitute a *vacancy*; and the 21st sec. of the same chap. which authorises selectmen to fill *vacancies* in certain offices, must have referance to *vacancies* created in the manner mentioned in this preceding section; which excludes all ground for holding that the refusal of Spear, in the present case, created a vacancy.

II. The proceedings of the selectmen in the appointment of *Clark* are not conclusive. They acted *ministerially*, and could only act in case of a vacancy. Whether there was a vacancy, within the meaning of the statute, was a question of

law, and their decision on the matter is no more *conclusive* than would be the decision of jail commissioners that notice to a creditor, in a given case, was not necessary. *Beardsley v. Knight*, 4 Vt. R. 471.

The opinion of the court was delivered by

REDFIELD, J.— 1. The first question in this case is, whether the refusal of a highway surveyor to execute a receipt for a tax bill, offered to him for collection, by the selectmen, is, *ipso facto*, a vacating of the office. We think it is not. Such refusal is, at most, the omission by such officer of a prescribed duty. The statute does not, in terms, visit any such consequence, as that contended for, upon the act complained of. To give it that effect, by construction, would be to adopt a principle, which, in practice, would render it necessary to fill most offices many times over, before the legal time appointed for a new election by the people.

2. Had the selectmen a judicial discretion in determining when they might make a new appointment? They doubtless, to some extent, had a discretion in the matter; for instance, in selecting a suitable person to fill any vacancy, which might occur. But we think a vacancy must have occurred in order to give them any jurisdiction of the matter. This vacancy must have occurred in one of the modes pointed out in the 20th section; "from non-acceptance, death, removal, insanity, or other disability." Now it cannot be contended that the present case comes under any of the terms used, unless it be the last, and it would not seem to require argument to show that the omission complained of, in this case, constitutes no disability to perform the functions of the office, in any such sense as that term is used in the statute. "Other disability" must import such like disability as had been before enumerated — that is, such as wholly vacated the office and left it the same as if there had been no appointment. In the present case no such vacancy had occurred; and, by consequence, the selectmen had no power to make an appointment, and their proceedings are irregular and void.

3. It is said the collector, or surveyor, was an officer *de facto*, and, therefore, his acts are valid. This may be true, so far as third persons are concerned, but not when the offi-

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cer himself, or those under whose authority he was appointed and put in motion, are called to justify his proceedings. They must show his right to exercise the functions of the office.

Judgment affirmed.

THEOPHILUS F. CLARK *v.* ISAAC W. BROWN.

It is no valid objection to the caption of a deposition, that the time of the session of the court when it is to be used, is no otherwise stated than as the court next to be holden, &c.

A deposition, *exparte*, need not be filed thirty days before the session of the court next after it is taken, when a term of the court intervenes between the time of the taking and using of the same.

TROVER, for a horse. Plea, the general issue, and notice of special matter.

The plaintiff in support of the issue, on his part, and to prove his title to the horse, offered the deposition of Jedediah S. Clark, which was objected to, because the time of holding the court when the cause was to be tried was not stated in the caption of the deposition, it being therein stated to have been taken "to be used in a cause to be heard and tried before the honorable county court, next to be holden," &c.; and because a term of the court intervened between the taking and filing of the same in the office of the clerk; said deposition having been taken without notice to the adverse party. The objections were overruled by the court, and the deposition admitted; to which decision, after verdict and judgment for the plaintiff, the defendant excepted.

J. L. Buck, for defendant.

The only question presented in this case is, whether the deposition of Jedediah S. Clark was properly admitted. It will be seen, by reference to the deposition, that it was taken on the 25th day of September, 1841, to be used in the next term of the county court, without stating when that term was to be holden, and was filed March 12, 1842.

1. It is insisted that the deposition was improperly admitted, because it was not taken agreeably to the statute. In chap. 31, § 7, R. S. p. 204, it is provided that the justice, taking a deposition, "shall certify such deposition in the *form*

prescribed by law." The form prescribed requires that the *time* and place of session of the court, at which a deposition is to be used, shall be inserted in the caption. R. S. p. 497.

2. Where a deposition is taken to be used at one term of the court, and is not filed with the clerk until after that term, it cannot be used at a subsequent term, for the reason that there would be no certainty that the deposition was taken to be used in the cause on trial. There should be a strict compliance with the statute, especially when a deposition is taken *exparte*, for in that case the opposite party has no opportunity of cross examination. *Burroughs* v. *Booth*, 1 D. Chip. 106. A *strict* and literal compliance with the statute is necessary, in order to make a deposition evidence. *Pingry* v. *Washburn*, 1 Aik. 264, 268. The caption of a deposition, taken by the plaintiff, must state the names of all the defendants. *Swift* v. *Cobb, et al.* 10 Vt. R. 282.

O. H. Smith, for plaintiff.

The deposition was taken the 5th day of September, 1841, and in the caption it is stated that it was taken "to be used in a cause to be heard and tried before the Hon. county court, *next* to be holden at Montpelier," &c.

We contend that this is a sufficient designation of the time of the session of the court. It has often been decided in this state that a substantial compliance with the requirements of the statute, in taking depositions is sufficient. The terms for holding the sessions of the county court are fixed by law, and the deposition in question was taken to be used at the next succeeding term of said court. In the case of *Smith* v. *Wood*, 3 Vt. R. 485, the court decided that an *exparte* deposition, filed with the clerk *less* than 30 days before court, but remaining there through the term, and till the succeeding term of the court, may then be read. In the case of *Nye* v. *Spalding, et al.* 11 Vt. R. 501, the court decided that the omission of the deponent's name in the caption and superscription, is not a valid objection to a deposition; and in the case of *Houghton* v. *Slack*, 10 Vt. R. 520, that the omission of the deponent's residence, in the caption, constitutes no objection. If the name and residence appear in the body of the deposition, that is considered sufficient. See also *Dupy*, v. *Wickwire*, 1 D. Chip. R. 237.

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Keith v. Day.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The only question presented by the bill of exceptions is, whether the county court erred in admitting the deposition of Jedediah S. Clark, which appears to have contained material testimony.

The deposition appears to have been taken for the reasons, and in the manner, provided by the statute. And there is no essential departure, if any, from the form given. In the form prescribed by the statute, the style of the court, and the time and place of session, are to be inserted. The style of the court is here inserted, i. e. "the county court." The place of session is inserted, "Montpelier;" and the time of session, which is determined by a public statute, is described with sufficient accuracy by saying *next* to be holden, &c. A departure from the literal form of the caption, as given by the statute, has not, heretofore, been considered as a fatal objection to its being read in evidence, when the substance of the form has been observed. The cases referred to, establish this proposition.

The statute requires that the deposition should be filed thirty days previous to the session of the court in which it is offered in evidence. We can see no sufficient reason for requiring, nor does the statute require, that the deposition should be filed thirty days before the session of the court next after it was taken. Indeed the case of *Smith* v. *Wood*, 3 Vt. 485, appears to be decisive of the question. For neither of the reasons, should the county court have rejected the deposition. The judgment is affirmed.

CHAPIN KEITH *v.* IRA DAY.

If one convey land, sequestered to the use of the University of Vermont, and covenant to warrant and defend the same against all lawful claims, this covenant extends to the claim of the University for rent.

If the rent be permitted to run behind, and the grantee suffer an eviction, in consequence of not paying it, he may recover the value of the land, at the time of eviction, as damages for the breach of such covenant.

But if in such case the grantee have conveyed some portion of the land to others, by deed of release merely, he cannot recover damages for such portion of the land, although the eviction extended to the whole parcel.

Quære, whether he might not have recovered damages for the entire breach of the covenant, if he had conveyed by deed of warranty.

Any conveyance of the land, after the eviction, will not affect the right of recovery.

This was an action of covenant broken.

The plaintiff, in his declaration, alleged, in substance, that the defendant, on the fourth day of March, 1806, by his deed of that date, duly excuted, &c., conveyed to one John Baker, his heirs and assigns, a parcel of land in Barre, containing sixteen and one half acres, (describing it by metes and bounds,) and in his said deed covenanted that he would warrant and defend said premises against all lawful claims of all persons whomsoever; — that said Baker, afterwards, to wit, on the 7th day of May, 1817, by his deed of warranty of that date, duly executed, &c., conveyed fifteen acres of said land (describing it by metes and bounds) to Joel Steele, his heirs and assigns; that afterwards, to wit, on the 9th day of April, 1818, the said Steele, by his deed of warranty of that date, conveyed said last mentioned land to the plaintiff, his heirs and assigns; that afterwards the corporation of the University of Vermont prayed out their writ of ejectment, made returnable to the November term, 1838, of Washington county court, against the plaintiff in this suit, to recover the seizin and possession of said last mentioned land, which writ was duly served and returned to said court, and such proceeding were thereon had that, at the term of said court held on the third Tuesday of November, 1839, the said corporation recovered judgment against the plaintiff in this suit for the seizin and possession of said land, and $37.-50, damages, and $19.37, costs, and that the said corporation recovered said judgment upon an elder and better title than the title derived from the defendant, and that the defendant was cited in to defend said suit in favor of said corporation against the plaintiff in this suit.

The defendant pleaded in bar of the action, as follows; that the premises, described in the plaintiff's declaration were in and by the original charter of said town of Barre, granted to, and for the use of a college in this state, and all lands so granted for the use of a college, are subject to the payment of annual rent, to wit, seventeen cents per acre, by all persons who occupy and possess them, under a conveyance from such college; that, on the 15th day of January, A. D. 1801, the corporation of the University of Vermont, by indenture of lease, in writing, of that date, duly executed, for the consideration of the annual rent of seventeen cents per

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acre, leased to Moses Rood of Barre, aforesaid, his executors administrators and assigns, as long as water runs or grass grows, the following tract or parcel of land, described in said indenture, to wit, "the second division lot, laid out, surveyed, and drawn as a second division lot to the original right granted to, and for the benefit and use of a college, containing one hundred acres of land," which said lease was recorded in the record of lands in the said town of Barre, on the 20th day of November, A. D. 1804, and the said Day avers that the premises described in the plaintiff's declaration are a part of said second division college lot above described, and that, on the 20th day of April, A. D. 1805, the said Moses Rood, by his deed of that date, executed in due form of law, for the consideration of the sum of two hundred and twenty-five dollars, sold and conveyed said premises in said declaration described, to one John Belding, of said Barre, and in said deed described them as a part of said second division lot drawn to the college right, and on the same 20th day of April, the said John Belding procured his said deed from the said Rood to be duly recorded in the record of lands in said town of Barre; and the said Day further says that on and prior to said 4th day of March, A. D. 1806, he was seized in fee of said premises in said declaration described, by virtue of a legal deed of conveyance from the said John Belding, subject to no charge or condition but the annual payment of a rent of seventeen cents per acre, thereafter to be paid to said university; that, being so seized and possessed of said premises, he, the said Day, on the 4th day of March, A. D. 1806, sold and conveyed said premises to the said John Baker, who then well knew that the said premises were a part of said college lot and subject to an annual rent of seventeen cents per acre; that the said John Baker, on the 7th day of May, A. D. 1817, by his deed duly executed, for the consideration of five hundred dollars, sold and conveyed said premises to one Joel Steele, and in said deed described said premises as a part of said second division college lot, and said deed was, on said 7th day of May A. D. 1817, duly recorded in the record of lands in said town of Barre; that, on the 9th day of April, A. D. 1818, the said Joel Steele, by his deed duly executed, for the consideration of four hundred and fifty eight dollars, sold and conveyed said premises to the said Chapin Keith, and in

said deed described said premises as a part of said second division college lot; and the said Day further says that on the 30th day of September, A. D. 1831, the said Chapin Keith, for the consideration of ten dollars to him in hand paid by John Moore Jr., sold and conveyed, by deed duly executed, to said John Moore, Jr., a part of said premises in said declaration described, and in, and by, said deed, covenanted with the said Moore that he, the said Keith, would warrant and defend said premises to said Moore, his heirs and assigns, against all lawful claims and demands of any person or persons whatever, except the annual rent due to the University of Vermont; that on the 18th day of Nov. A. D. 1831, the said Chapin Keith, for the consideration of twenty five dollars, to him in hand paid by Smith Sherman, sold and conveyed, by deed duly executed, to said Sherman another part of said premises; and in, and by, said deed covenanted with the said Sherman that he, the said Keith, would warrant and defend the same to him, the said Sherman, his heirs and assigns, against all lawful claims and demands whatever, except the annual rent due to the corporation of the University of Vermont; that on the 3d day of April, A. D. 1840, the said Chapin Keith, for the consideration of four hundred dollars, to him in hand paid by William Bassett, sold and conveyed, by deed duly executed, to said William Bassett another part of said premises and in and by said deed, he, the said Keith, covenanted with the said Bassett, that he, the said Keith, would warrant and defend said premises to the said Bassett, his heirs and assigns, against all lawful claims and demands of any person or persons whatever, except a yearly rent to be paid the University of Vermont; that, on the 24th day of March, A.D.1841, the said Keith, for the consideration of four hundred and fifty dollars, to him in hand paid by one Orsamus Walker, sold and conveyed, by deed duly executed, to said Walker another part of said premises and in and by said deed he, the said Keith, covenanted with the said Walker that he, the said Keith, would warrant and defend said premises to the said Walker, his heirs and assigns, against all lawful claims and demands of any person or persons whatever, except the annual rent due the University of Vermont; and the said Day avers that in all the aforesaid deeds, executed by the said Keith, of parts of the aforesaid premises, he, the said Keith,

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excepted said annual rent to the corporation of the University of Vermont from his covenants in said deeds, and in no way or manner obligated himself to pay said rent, or any part thereof; and the said Day further says that the aforesaid conveyances, made as aforesaid by the said Keith, convey and transfer the title to the said grantees of the whole of the aforesaid premises in said second count described, except (describing a part thereof) of the value of $50; and the said Day doth further aver that the several persons through whose hands said premises were passed and by whom the same were conveyed to the said Keith, as in the said declaration mentioned and described, during the time they owned and held the title to said premises, severally paid to said University the annual rent due theron, and the said Keith, since he has owned and possessed said premises, and after conveyance therof to him, at various times, paid the said annual rent to the said University of Vermont, which accrued while he so held, owned, and possessed said premises under his said deed from the said Steele; and the said Day further says, that, on the 22d day of August, A. D. 1838, the day on which said action of ejectment in said declaration mentioned, was commenced, there was then due to said University a great arrear of rent, to wit, $35.00, the whole of which had accrued subsequently to the 9th day of April, 1818, and while the said Keith held and possessed said promises under his said deed from the said Steele, and that for the non-payment of this rent, which it was the duty of said Keith to pay, and for no other cause, was said action of ejectment, in said declaration mentioned, commenced, prosecuted and a recovery had thereon by the said corporation of the University of Vermont against the said Keith; and the said Day further says, that, in said action of ejectment in favor of the said corporation of the University of Vermont against the said Keith, judgment was rendered for $37,50 damages, which was for the amount of rent due to said University up to the commencement of said action of ejectment, and the interest thereon; that afterwards, to wit, on the 14th day of April A. D. 1840, the said Keith paid to the said corporation of the University of Vermont the amount of damages aforesaid so recovered in said action of ejectment, as aforesaid, and the cost of the said suit, and has ever since said recovery and the payment of said damages and cost pos-

sessed, enjoyed, and occupied said premises under his said deed from the said Steele, with the assent and permission of said corporation of the University of Vermont; and the said Day further says that, after the recovery in said action of ejectment, and the payment of said damages and cost, said corporation of the University of Vermont did not claim that the said Keith should surrender the possession of said premises, or accept from them a new lease of the same, but suffered him to occupy, possess, and enjoy said premises under his aforesaid deed from the said Steele, in the same manner he did before the commencement of said action of ejectment, all which the said Day is ready to verify, &c.

To this plea the plaintiff replied, that, by reason of any thing in said plea set forth and stated, he ought not to be barred from having and maintaining his said action, because, he says though true it is that the premises described in the plaintiff's declaration are a part of the second division lot, laid out, surveyed and drawn to the original right granted to the use and benefit of a college, and said lot was, by the corporation of the University of Vermont, leased to the said Moses Rood as in said plea mentioned, yet that the said Moses Rood, on the 20th day of April, A. D. 1805, by his deed of that date, executed in due form of law, for the consideration of two hundred and twenty-five dollars, paid him by one John Belding, did sell and convey to said Belding the same premises, in said declaration mentioned, in fee, and did, in and by said deed, covenant to and with said Belding, his heirs and assigns, that said premises were free from all incumbrances, and that he, the said Rood, would warrant and defend the same against all lawful claims whatever; that, afterwards, the said John Belding, by his deed, dated November 19, 1806, duly executed, for a valuable consideration, sold and conveyed the same premises to the said Ira Day, without stipulations or reservations for the payment of the rent on said premises by said Day, which deed was, and is, all the title said Day ever had in, or to, said premises. And now, the plaintiff in fact saith that the said Moses Rood, from the time of his executing his aforesaid deed to John Belding of the premises therein described, to the time of his, said Moses', death, which took place about the year 1839, always acknowledged his liability to pay, and, from year to

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year, all the years up to his death, in fact, did pay, to the corporation of the University of Vermont, all the rent on the same land deeded by him to said Belding, and described in the plaintiff's declaration, together with the rent on the residue of said lot. And that the several persons, through whose hands said premises were passed from said Rood, and by whom the same were conveyed to this plaintiff, as in the said declaration mentioned and described, during the time they owned and held the title to said premises, did not severally, or in any other manner, pay to said University the annual rent thereon, and of this he puts himself on the country for trial.

To this replication the defendant demurred specially, and set down the following causes of demurrer, viz. that the plaintiff hath in his replication set up new facts to avoid the defendant's plea in bar, and thereupon tendered an issue to the country when he ought to have ended with a verification, and also for that the said replication is, in other respects, uncertain, defective, and informal.

The county court decided that the replication was sufficient, and the defendant excepted to the decision. The plaintiff then insisted that the rule of damages should be the value of the land from which he had been ousted by the judgment in the suit in favor of the University of Vermont against him; but the court decided that the plaintiff could recover in damages only the amount of the damages and costs and interest thereon, recovered against him in said ejectment suit of the University of Vermont. To this decision the plaintiff excepted.

N. Kineman and *P. Dillingham*, for plaintiff.

I. The case shows that though the premises in question were called college lands, yet that all the deeds from Moses Rood down to Keith, were deeds of warranty, with all the usual covenants of seizin and title, containing no allusion to rent or reservation about its payment.

In order to qualify the construction to be put upon those deeds, the defendant, by his plea, alleges that all the several grantees, from Rood down to Keith, severally paid rent to the University while they held the premises, and acknowledged thereby their obligation so to do. This fact the replication traverses.

The replication contains no new issuable fact. All that is said in it about Rood's deed to Belding and Belding's deed to the defendant, is but affirming or admitting what defendant has alleged in his plea. That part, therefore, is at most but surplussage, and, if left out, leaves a good traverse of the main fact relied on by defendant.

The demurrer is, therefore, badly taken. But were the replication bad for the cause assigned, yet the pleas are bad, disclosing nothing to qualify the natural force of defendant's covenants in his deed to Baker.

It is wholly immaterial that Baker knew that the premises were a part of the college lot, and consequently subject to rent. Each grantee looked to the grantor's covenant of title as a guaranty against that rent which it was the grantor's business to keep down.

We think the cases cited by defendant, from 1 Term R. 2 & 4, N. H. and other kindred authorities, do not authorize any modified construction of this deed, in this case. See 7 Term R. 703.

II. Admitting the plaintiff's right to recover, what should be the rule of damages? The declaration charges, and the defendant's plea admits, a legal ouster. *Williams* v. *Wetherbee*, 1 Aik. R. 233. In such case, the rule of damages is well settled to be the value of the premises at the time of the ouster. *Strong* v. *Shumway*, D. Chip. R. 110; *Park* v. *Bates*, 12 Vt. R. 381. Can a case be found where the grantee is bound at his peril to extinguish and keep down incumbrances, where there is a general warranty? And as the declaration shows that the defendant in this case was cited in to defend the suit of the University against plaintiff, he cannot complain that the land was lost. Nor, can the fact that the University have permitted him to remain in possession of the premises since the recovery, vary the rule of damages. He may have re-purchased, or the University may take them away to-morrow.

W. Upham and *L. B. Peck*, for defendant.

The plaintiff's right of recovery depends upon the construction given to the defendant's deed to Baker, dated March 4, 1806. It appears from the pleadings that the land conveyed by the defendant to Baker was a part of the college

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right; and that all lands granted by charter for the use of a college are subject to an annual rent of seventeen cents per acre; and it further appears that Baker, at the time he received his deed, well knew that the land was a part of the college right, and subject to the aforesaid rent. We insist that the covenant of warranty, in defendant's deed to Baker, does not extend to the annual rent due the college. It is evident, from the facts set forth in the plea, that the parties did not consider it within the meaning of the defendant's covenants at the time of the conveyance. This reservation of rent was well known to Baker when he received his deed, and it was a matter of public notoriety, that all college lands in this state were subject to such rent. In view of the facts in this case, it seems to us that the court are not absolutely bound by the terms of the defendant's deed to Baker to put the construction upon it for which the plaintiff contends. It should be construed with reference to its subject-matter, and the intention of the parties at the time it was made. *Doe* v. *Burt*, 1 T. R. 701; *Watts* v. *Wellman*, 2 N. H. R. 458; *Ten Broeck* v. *Livingston*, 1 Johns. Ch. R. 357, 362; *Jackson* v. *Hoffman*, 9 Cowen, 271. The situation of land at the time a deed was executed, may be proved and taken into consideration in giving a construction to it. *Webster* v. *Atkinson*, 4 N. H. R. 21, 24; *Crosby* v. *Parker*, 4 Mass. R. 110; *Worthington* v. *Hylyer et al.*, 4 Mass. 196; 1 Shep. Touch. 169, 197; 3 Comyn's Dig. 262, 266; *Thead* v. *Starkie*, 8 Mod. 314; *Combe* v. *Jones*, 2 Chitty's R. 700; *Cooke* v. *Boothe*, 2 Cowp. R. 819, 822; *Lant* v. *Norris*, 1 Burr. 289; *Dudley* v. *Tolliott*, 3 T. R. 584; *Spring* v. *Tongue*, 9 Mass. R. 28.

2. The replication to our plea is manifestly insufficient. The material facts in the plea are not admitted and avoided, nor denied. The new matter introduced into the replication, that Rood paid the rent from 1805 to 1830, is of no importance. If, however, the court should consider it important, then we say the replication should have concluded with a verification, and not to the country. 1 Chit. Pl. 656–659.

3. If the plaintiff is entitled to recover, the judgment of the court below should be affirmed, for the rule of damages there adopted was correct. We are aware of the general rule in actions of this kind, that the measure of damages is

the value of the land at the time of the eviction. *Strong* v. *Shumway*, 1 D. Chip. R. 110; *Williams* v. *Wetherbee*, 2 Aik. R. 339; *Park* v. *Bates*, 12 Vt. R. 381. But there are exceptions to this rule; and this case, we think, is one. Here the plaintiff has not been ousted of the full value of the premises. All he has lost by the alleged ouster is the amount of the rent recovered of him by the college in 1839, and the costs of the suit, and that is all he is entitled to recover. *Strong* v. *Shumway*, 1 D. Chip. R. 110; *Niles* v. *Sawtell*, 7 Mass. R. 444; *Boothe* v. *Starr et al.*, 1 Conn. R. 244; *Lockwood* v. *Sturdavent*, 6 Conn. R. 373, 391; 1 Swift's Dig. 366. But there is another reason why the rule of damages adopted by the county court should be sustained. It is this: the plaintiff, after the recovery by the college, sold and conveyed the premises to some two or three individuals in Barre, and received in cash all they were worth at the time of the alleged ouster, and all his deeds of the same contain a covenant, that he would warrant and defend the premises, &c., against all lawful claims and demands of any person or persons whatever, "*except a yearly rent to the University of Vermont.*" So the court will perceive, if the rule of damages contended for by the plaintiff prevails, he will receive the value of the premises twice. A rule, productive of such consequences, this court, we think, will never adopt. Again; it is alleged in the plea in bar, and not denied in the replication, that the University of Vermont, after the recovery and payment of the damages and costs, did not claim that the plaintiff should surrender up the possession of the premises, or receive a new lease, but suffered him to occupy, possess, and enjoy them under his deed from Steele, in the same manner he did before the commencement of the action of ejectment. The recovery by the University, under the circumstances of this case, can hardly be called a breach of the covenant of warranty. *Kere* v. *Shaw et al.*, 13 Johns. R. 238; *Waldron* v. *M'Carty*, 3 do. 471; *Knots* v. *Carpenter*, 5 do. 120. But, if the court feel bound so to consider it, actual damage is all the plaintiff should recover. *Barnes* v. *Larnard*, 5 N. H. R. 264; *Morse* v. *Shaddock*, 4 do. 226; *Leland* v. *Stone*, 10 Mass. R. 459.

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The opinion of the court was delivered by

REDFIELD J. — The first question made in the case is, whether the covenants in defendant's deed, of general warranty of title, are to be considered as a covenant against the claim of the University for rent. The terms of the covenant are to warrant and defend the premises against the claims of *all* persons. Now it is not very obvious how the fact that this land was college land, subject to a rent to be paid annually, should affect the construction of this covenant so as to except that claim from its operation. The fact that both parties knew of this claim, and that the one *insisted upon*, and the other *gave*, a *general* covenant of warranty against *all* claims, without exception, would seem the best of all reasons why that claim, which was in the minds of the contracting parties, at the time of entering into the covenant, and which was clearly within the terms used, "all claims," should not, by any *construction*, be taken out of its operation.

So too the subsequent conduct of the parties to a deed, or of their grantees and assignees, may be an important ground of fixing the signification of *equivocal* terms used in the deed; but where the terms used are explicit, and *unequivocal*, no such ground of construction can ever be resorted to, at least in a court of law. If such facts exist as to show a mistake of the parties in reducing their contract to writing, the party injured is not without remedy.

2. The only remaining question is in regard to the damages. As we cannot leave the covenant still open, to compensate plaintiff, or his assignees, for future claims of rent, but one recovery must be considered a full satisfaction, it is plain, that the recovery of the rent which had accrued at the time of the eviction, would be no adequate compensation to the party evicted, as the covenant runs against *all* claims, and for their consequences. The covenantor then should either keep down the rent, or if he suffers it to run behind, and the grantee or assignee is evicted, the rule of damages will be the same as in other cases, i. e. the value of the land at the time of eviction.

3. A question was made at the bar, but not very fully discussed, how far an intermediate grantee could recover for a breach of the covenants of warranty, while the premises were held by his grantee or a remote assignee. The court

intend to adhere to the rule, as laid down in *Williams* v. *Wetherbee*, 1 Aiken, on the 239th page, by Royce J., which would seem to be an approval of the rule, as laid down by Parsons, C. J. in *Bickford* v. *Page*, 2 Mass. on the 460th page: "it is a general rule, that when a feoffment or demise is made of land, if the feoffee or lessee assign the land *before the covenants are broken*, and afterwards they are broken, the assignee *only* can bring an action of covenant to recover damages, unless the nature of the assignment be such that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor." This seems to be the principle promulgated in 5 Cow. 137, and in 4 Kent's Com. 471, 472, n. *b*. This would seem to be the present rule upon the subject. It is true, some of the cases go further, and hold, that an intermediate grantee cannot sue upon covenants, running with the land, until he has been called upon by the last assignee; in whom the right of action primarily vests, and *has made compensation*. *Booth* v. *Starr*, 1 Conn. 244. And one might infer as much from the stress laid upon that circumstance by Chancellor Kent, in the note above alluded to, and the frequent reference of this subject to the analogy of successive indorsers of a note or bill. But it is not necessary to pass upon that question, as, in the present case, there is clearly no obligation resting upon the plaintiff in this case to indemnify those to whom he had conveyed before the eviction, and if he should now be permitted to recover the value of the land conveyed to them and thus extinguish the covenant, they must be without redress. But in the present case, it would seem that the plaintiff conveyed a portion of the land after the eviction. For that portion, and that which he still retains, he must recover the value, but nothing for that which he had conveyed before breach, unless he was bound to indemnify his grantee. The covenant, after the breach by eviction, became a mere *chose in action*, and not assignable. And as the title was gone by the eviction, it is not readily perceived how a conveyance *subsequently* to the breach could affect the rule of damages.

Judgment reversed and cause remanded.

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JOSEPH REED *v.* LYMAN FIELD and WILLIAM P. BRIGGS.

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Where two written instruments are made at the same time, relating to the same subject-matter and to one entire transaction, they are to be construed together, and one may qualify the other.

In a case where a note was to become obligatory upon there being a failure of title in a third person to certain premises, it was held unnecesary, in an action on the note, to show such failure by an adjudication of a court of competent jurisdiction, in an action brought to try the title.

Held, that the town clerk of the town where title deeds are to be recorded might be called as a witness to prove that no title of record appeared in a person, who professed to convey the title, except under a vendue deed, and that this was competent evidence tending to prove a want of title in the person so conveying the land.

To make title under a vendue deed, the requisitions of the statute must be complied with; and the recitals in a collector's deed, though of long standing, are not *prima facie* evidence of it, where there has been no possession under the vendue title.

The claiming title, and payment of taxes upon unoccupied lands, is no *adverse* possession.

ASSUMPSIT, on a promissory note, dated February 18, 1839, given by the defendants to J. P. Miller or order, and by him indorsed to the plaintiff. Plea, non assumpsit. Issue to the country. On the trial in the county court, the execution of the note, and the indorsement thereof to the plaintiff having been admitted, the defendants read in evidence a paper, admitted to have been executed at the time of the execution of the note, of the following tenor:—

"Whereas, Lyman Field and William P. Briggs have this 'day signed a promissory note to me for twelve hundred and 'twenty-seven dollars and five cents, payable on demand, 'with interest annually, which note I have taken as collateral 'security of a debt of the same amount, due from Thomas 'Chittenden, which debt of said Chittenden to me is secured 'by mortgage on his lands in the town of Worcester; and 'the said Briggs and Field are not to be called on to pay the 'note by them so signed to me, under two years from this 'date, nor then, unless there should be a failure of title in 'the said Chittenden, to the said lands, in Worcester; and, 'at the expiration of the said two years, if the title of the 'said Chittenden shall prove good and valid, then, in that 'case, the said note is to be given up to the said Briggs and 'Field, unless they shall elect to pay the money; and if they

'so elect, then I am to discharge or assign the mortgage given me by the said Chittenden. J. P. MILLER."

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Upon these papers the court held that the plaintiff was not entitled to recover without showing a failure in the title to some portion of the land described in the contract. The plaintiff then called the town clerk of Worcester as a witness, who testified that he had examined the records of deeds of lands in that township, and could find no other title in Thomas Chittenden to lands in Worcester, than that derived through Noah Chittenden and Martin Chittenden, which rested ultimately upon the vendue of Stephen Pearl. The plaintiff then gave in evidence copies of the several deeds on record, tracing title from said Pearl to Noah Chittenden, and also a copy of the proceedings of said Pearl from the records of the county clerk in Chittenden county, all which the court held insufficient to show title in said Thomas Chittenden, and that this was *prima facie* evidence of a defect of such title.

The defendants then gave in evidence the copy of a deed of these lands from Ezra Goodrich to Noah Chittenden, and from said Noah to said Thomas, and also from said Noah, as sheriff of the county of Chittenden, to said Ezra of a date anterior to either of the deeds last named, purporting to be a collector's deed, on sale of these lands, under an act to defray the expense of running town lines. The defendants also gave in evidence copies of the proceedings of said Noah previous to such sale.

The court held these proceedings insufficient to vest any title, and ordered a verdict for the plaintiff for the amount of the note and interest. The defendants offered to show that, for nearly fifty years, Chittenden had maintained the undisputed control of these lands, so far as unoccupied lands are susceptible of any control, and had, during all that time, paid the taxes thereon, and that there was not now known to be any other claimant to the same; but the court considered the testimony of no importance, and rejected it. The defendants excepted to the decisions and judgment of the county court.

W. Upham for defendants.

I. By the terms of the written contract, between the par-

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ties, made at the time this note was given, it was not to be put in suit until the title to the lands, mortgaged to Miller, had failed.

II. There had been no such failure of title as the contract contemplated, at the time the suit was commenced. Some effort should have been made by Miller to test the validity of Chittenden's title to the mortgaged lands, before calling upon the defendants for the payment of this note.

It appears from the case that there is now no known claimant to the lands, save Chittenden; consequently, it cannot be said, we think, that his title has failed. It is as good now as it was when the note was given, and nothing has transpired since to show a failure of it. It must, therefore, for the purposes of this trial, be regarded as good. Nothing appears in the case to show that Chittenden would not have redeemed the lands if Miller had brought his bill of foreclosure.

III. It was not competent for the plaintiff in the court below, in this action on note, to attack the validity of Chittenden's title to the mortgaged lands, by calling the town clerk to show that it rested on the legality of Pearl's vendue. But if it were proper to take that course, the burden of proof was on the plaintiff.

IV. The proof offered by defendants in the court below, to show that Chittenden had for *fifty years* maintained the undisputed control of these lands, so far as unoccupied lands are susceptible of any control, and during all that time paid the taxes on them, and that there was not now known to be any other claimant, should have been admitted. *Ewing* v. *Burnet*, 11 Peters' R. 41.

V. Chittenden's title to the lands in question, derived from Noah Chittenden's deed, as sheriff and collector in 1789, is good and should have been sustained in the county court. It was not necessary for the defendants to show the proceedings of Noah Chittenden before the sale. The recital in his deed, that he had "in all things pursued the directions of the act" is, after the lapse of 54 years, *prima facie* evidence of the legality of his proceedings, and the *onus probandi* lies on the party resisting them to show their illegality. *Parker* v. *Bixby*, 2 Tyler's R. 446; *Hall* v. *Collins*, 4 Vt. R. 316, 326.

VI. Failure of title to a part of the lands, mortgaged by Chittenden to Miller, will not enable him to recover on this note, if the title remains good to a sufficient quantity to secure his note against Chittenden. This note was given as collateral security for the Chittenden note, and if the security taken for that note remains good, this note should not be collected.

VII. There can be no recovery upon this note until some person shall lay claim to the mortgaged lands against the Chittenden title, and make good his claim before some court of competent jurisdiction.

VIII. Notice of the failure of title should have been given the defendants before the commencement of this suit.

Heaton & Reed and *L. B. Peck*, for plaintiff.

I. The correct construction was put upon the contract by the court below. The defendants were to be liable on the note at the expiration of two years, in case it turned out that Chittenden's title was valid. The parties could never have intended it should receive a different construction. If the defendants were not to be made liable on the note until the title to the lands should be settled against Chittenden by some legal adjudication, years must elapse before payment of the note could be enforced, as the lands are unoccupied, and the title could not be thus tested until possession should be taken by some person claiming *adversely*.

II. The payment of taxes had no tendency to show the title in Chittenden, especially when it was shown negatively that he had none.

III. The *recital* in the collector's deed, that he had pursued the requisitions of the statute in his previous proceeding, is no evidence of that fact. *Jackson* v. *Shepherd*, 7 Cow. 88; *Williams et al.* v. *Peyton's lessee*, 4 Wheat. 77.

The opinion of the court was delivered by

BENNETT, J. — Though the bill of exceptions in this case does not show to what decisions of the county court the defendants excepted, yet this, no doubt, was an inadvertence, and might be amended. We will, however, consider the questions raised on argument.

The written contract of the payee of this note, made at

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the same time with the note, and parcel of the same transaction, will qualify and control the rights of the parties on the note. Both instruments must be taken as parts of one transaction. By the written contract the defendants were not to pay this note, unless there should prove to be a failure of title in Chittenden in the lands which he had mortgaged to the payee to secure the debt for which the note now in question was given as collateral security. It could in no way be necessary, in an action on the note, that the plaintiff should show a want of such title by the judgment of a court of competent jurisdiction. If there was a failure of title in Chittenden this note was to be obligatory on the defendants.

All that could be necessary was, that it should appear on trial that there was a defect of title. This might as well be settled in the trial on the note as any other condition which was to affect the validity of a note.

As the county court held that the burden of proof was on the plaintiff to show the want of title in Chittenden, (of which the defendants have no reason to complain,) the testimony of the town clerk was competent to show that Chittenden had no title of record, except what rested on the Stephen Pearl vendue.

This would seem the only way in which the plaintiff could proceed to establish the negative.

The defendants rely upon the collector's deed, as showing title under the Pearl vendue in Chittenden, without showing a compliance with the requisitions of the statute relative to sales of this description. The recitals in the deed are not *prima facie* evidence of such compliance. This has long been well settled. The fact that the deed may have been of long standing, can make no difference in a case where there never has been a possession under such pretended title. The county court, we think, were well warranted in holding that, *prima facie*, there was no title in Chittenden. The evidence that Chittenden had paid taxes, &c, on the land, could have been of no avail. It constituted no act of possession, and did not tend to prove a possessory title, and of course was properly excluded.

The judgment of the county court is affirmed.

Fanny Simmons v. John Adams and Lucius Parmalee.

The recognizance, taken by a justice in the proceedings under the bastardy act, conditioned, "that the principal shall abide such order or orders as the county court shall make in the premises," is holden as a security for the performance of the order until a new recognizance shall have been entered into, unless discharged by a surrender of the principal.

Debt, on a recognizance to the plaintiff, in the penal sum of three hundred dollars, entered into by the defendant, Adams, as principal and the defendant Parmalee, as surety, on the 22d day of February, 1841, before Elymas S. Newcomb, a justice of the peace in and for the county of Washington, the condition of which is as follows:—

"The condition of the above recognizance is such, that 'whereas Fanny Simmons, a single woman, did, on the 22d 'day of February, 1841, in writing, and on oath, before said 'justice, charge the said John Adams with having begotten 'a child upon the body of her, the said Fanny Simmons, on 'or about the first day of November, A. D. 1839, at Wa-'terbury, in said county, and with being the father of said 'child; and that said child was born on the 25th day of Ju-'ly, A. D. 1840, and was then, and still is, a bastard, and 'that said child is now alive:

'Now, therefore, if he, the said John Adams, shall person-'ally appear before the county court, next to be holden at 'Montpelier, within and for the county of Washington, on 'the second Tuesday of April, A. D. 1841, and abide such 'order as the said court shall make in the premises, then 'this recognizance to be void, otherwise of force."

And the plaintiff averred, among other things, that such proceedings were had upon her complaint against the said Adams, that, at the November term of Washington county court, 1841, the said court did adjudge that the said Adams was the father of said bastard child, and ordered that the said Adams pay to the plaintiff the sum of one hundred and fifty dollars towards the support of said child, and the costs of prosecution, taxed and allowed at $34.84; fifty dollars thereof, and the costs aforesaid, to be paid in sixty days from the rising of said court, and fifty dollars annually thereafter in quarterly instalments, as by the records of said

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court would more fully appear, and that, although sixty days from the rising of said court had long since elapsed, the said Adams had not paid said first mentioned sum of fifty dollars, and said costs, though often requested, whereby said recognizance had become forfeit, &c.

The defendants pleaded *nul tiel record*, on which issue was joined to the court, and a special plea in bar, in substance, as follows :—

" That the said Adams, according to the true intent and ' meaning of said supposed recognizance and the condition ' thereto attached, did at the term of Washington county ' court holden at Montpelier, within and for the county of ' Washington, on the second Tuesday of April, A. D. 1841, ' appear in person before said court, and then and there ' answered to said cause, when the same was continued to ' the then next term of said court to be holden at said ' Montpelier, within and for said county, at which time the ' said *Adams* again appeared *in person* before said court, ' and made answer to the complaint of the said Fanny Simmons, when such proceedings were had in said matter that ' the jury, empannelled to try the issue between the parties ' thereto, returned a verdict of guilty against said Adams, ' whereupon the order in the plaintiff's declaration mentioned was then and there made by said court, and that the ' said Adams was then and there during the time of such ' proceedings, in attendance upon said court, subject to any ' order the court should make in the premises and ready and ' willing to abide any such order of said court in the premises, ' and that the said Adams has ever since resided and still ' resides in Waterbury, in said Washington county, all ' which the defendants are ready to verify," &c.

Replication to the second plea. " That during the term ' of the court in which said orders, in plaintiff's declaration ' mentioned, were made against the said Adams, he did not ' enter into any recognizance before said court with sureties, ' to the plaintiff, the mother of said child, with conditions, ' agreeably to the provisions of the *eighth* section of chapter ' 67 of the Revised Statutes, nor was he, for his neglect and ' refusal so to do, committed to the common jail in said county ' of Washington, agreeably to the provisions of the *ninth*

'section of said chapter of the Revised Statutes," concluding with a verification.

Rejoinder.—" That said Adams was not required to enter 'any such recognizance as stated in the plaintiff's replica-'tion, nor was he committed to jail; but he was then and 'there ready, in said court, to enter and procure such re-'cognizance as said court should order and direct, agreeably 'to the statute," &c.

To this rejoinder there was a demurrer and joinder.

The county court rendered judgment for the plaintiff, on both issues, and the defendants excepted to the decision.

R. C. Smith and *L. B. Peck*, for defendant.

The condition of the recognizance was saved by the appearance of the principal. The undertaking of the defendants was not that Adams should pay such sums as the court might order, but that he should appear and take his trial and be in court subject to the further order of the court. The 8th sec. chap. 67, p. 349, R. S., contemplates that if the principal is found chargeable, he shall enter into *another* recognizance conditioned for the *payment* of such sums as may be decreed to be paid.

The 9th section provides the remedy for his neglect to procure such recognizance by a committal to jail. The 8th section, it is true, declares that on his entering into this recognizance, the one before the justice shall be discharged. Such would necessarily be the result without this enactment. But, suppose he neglects to comply with the order, and is committed for such neglect, is it not clear that the first recognizance is thereby discharged? Such must be the effect of the commitment, for it will hardly be contended that the plaintiff could hold the party in prison on the warrant, and also hold him liable on the recognizance.

This view of the case tends strongly to show that it is no part of the condition of the recognizance before the justice, that the sums awarded by the court shall be paid, as in that case the commitment would not discharge the condition. If the recognizance is to have the effect claimed by the plaintiff, the 8th and 9th sections of the act were entirely unnecessary.

Though the precise point now in judgment has not been decided, the decisions of this court, so far as they have gone,

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favor the construction put upon the act by the defendant. *Mather* v. *Clark*, 2 Aik. 209; *Gray* v. *Fulsome et al.* 7 Vt. R. 452; *Jerdan* v. *Lovejoy*, 20 Pick. R. 86.

P. Dillingham, for plaintiff.

The pleadings, in this case, present no facts that discharge the recognizance taken by the justice, and on which this suit is founded. This is settled beyond controversy, unless the Revised Statutes, on this subject, are substantially different from the act of 1822. The condition of the recognizance, under the old staute was, that defendant personally appear &c., "and abide and perform such order or orders as such court shall make in the premises" and in the Revised Statutes it is, that he personally appear, &c. "and abide the order of the court thereon." These provisions are substantially the same. By the old statute, the court made orders for the support of the child, taxed cost &c., and were empowered to order that defendant, during the term, should enter into recognizance to perform the order of court, and that, upon entering into such recognizance, the one taken before the magistrate should be void. The new statute provides for the same power of making orders for support, and, by the 8th section, provides for defendant's entering into a recognizance to perform such orders, and, on that being done, provides that the recognizance, entered into before the justice, shall be null and void.

It would seem that nothing short of a new recognizance, under either statute, would discharge the one taken before the justice. By sec. 9, R. S., it is provided that if defendant neglect or refuse to enter into a recognizance, he may be committed to jail; by the old statute, if he neglected or refused to enter into such recognizance, being in custody, he should be committed, &c. Neither statute provides how the father shall be taken into custody. I think it must, under either act, be by surrender, by the bail, or the principal himself. *Mather* v. *Clark* 2 Aik. 209; *Gray* v. *Fulsome & Fellows*, 7 Vt. R. 452.

The power of taking into, or being in custody, seems the same under both acts. If the mother is satisfied with the original bail, and the surety is content to remain such, and does not surrender the principal, the recognizance should not

become void, only on the condition of the father's coming voluntarily into court and entering into a new recognizance.

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The opinion of the court was delivered by

BENNETT, J.—It is claimed, in this case, that, by the principal's appearing in the county court and taking a trial, the recognizance was discharged, although he was found guilty, and adjudged the putative father of the child and charged with its support. The condition is, that the principal shall appear, &c., and "abide such order or orders as the said court shall make in the premises." Though the principal might surrender himself in discharge of bail, or be surrendered by the bail, yet, in such event, he would be ordered into custody, and the recognizance would then be discharged. As, in this case, there was no surrender, there was no right to order the principal into custody. Under the former statute, (Slade's Comp. 367) when it was determined that the person recognized was chargeable with the support of the child, the court made an order for that purpose, and, also, that the putative father, during the term, should, with sufficient surety, enter into a recognizance conditioned for the performance of such order. When this was done the original recognizance, by the terms of the statute, was discharged. This implied that, until a second recognizance had been entered into, the first remained in full force. The settled construction of this act has been, when there has been no surrender, to hold the original recognizance as a security that the principal shall perform the orders of the court in the premises, unless discharged by a new recognizance. But it is said, the Revised Statutes should receive a different construction. The 7th sec. provides, that when the defendant has been found guilty, he shall be adjudged by the court to be the father of such child, and shall stand charged with its support, with the assistance of the mother, in such manner and in such proportion as the court shall judge proper. It is then made the duty of such father, during the term, to enter into a recognizance, with sufficient surety, that he will abide and perform the orders of the court in the premises. Upon this being done, the statute provides that the recognizance, entered into before the justice, shall be null and void. In the old statute the court are to make an

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order that the father enter into a recognizance, &c. By the Revised Statutes, he is to enter into a recognizance without a special order to that effect. There is no reason why the liability, under the old act, upon the first recognizance, should be greater than under the Revised Statutes. Indeed, as it is expressly made the duty of the father to enter into a second recognizance, upon which the first is discharged, without a special order, the case would seem, at least, to be as strong, if not stronger, against the defendants, than under the old statutes.

The result is, the judgment of the county court is affirmed.

CALEDONIA COUNTY.

MARCH TERM, 1843.

Present, Hon. CHARLES K. WILLIAMS, *Chief Justice.*
" STEPHEN ROYCE,
" ISAAC F. REDFIELD, } *Assistant Justices.*
" WILLIAM HEBARD.

ALDEN E. JUDEVINE *v.* ISAAC PENNOCK, JR.

In an action on the covenants of a deed against incumbrances, in support of which the plaintiff relies on a prior mortgage of the premises by the defendant, proof that the notes, on which the mortgage was founded, were paid and taken up, will entitle the defendant to a verdict, notwithstanding the mortgage deed was not discharged on the record.

THIS was an action of covenant broken. Plea, that the defendant had kept and performed his covenants. Issue joined to the country. The plaintiff, to support the issue, on his part, read in evidence, without objection, a deed, dated September 20, 1838, containing covenants of seizin and warranty against incumbrances. The plaintiff also produced a certified copy of a mortgage deed from Pennock & Dodge to Moses and William Hutchins, dated May 17, 1834, of the same land described in the deed above named, — said mortgage was given to secure the payment of notes therein described.

The defendant then introduced evidence tending to show that the notes, described in the condition of said mortgage, had been paid and taken up previous to the 20th of September, 1838. The mortgage, it appeared, remained undischarged, and there was no evidence to show that the plaintiff knew that the notes had been paid. The said Hutchins, it appeared, resided in the state of Illinois. Under this state of facts, the plaintiff requested the court to charge the jury, that the evidence introduced by the defendant did not tend to prove the issue raised by the pleadings, and that, inasmuch as said mortgage remained undischarged upon the record, the plaintiff was entitled to recover. But the court refused so to charge; but did charge that if the jury found the notes

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described in the mortgage to have been paid, before the execution of the deed containing the covenants declared upon, although the mortgage was undischarged upon the record, the defendant was entitled to recover; to which charge the plaintiff excepted.

J. R. Skinner, for plaintiff,

1. The evidence of payment, had no legal tendency to prove the issue. The defendant should, in his plea, have set forth the performance, so that the plaintiff could have been prepared to rebut the evidence. A plea of general performance, when a particular breach is assigned, is bad. *Bradley* v. *Ousterhoudt*, 13 Johns. R. 404.

2. A mortgage, undischarged upon the town records, is an incumbrance. *Hoyt* v. *Swift et al.* 13 Vt. R. 129. The statute, Slade's Comp. 170, §11, points out the mode of procedure, in procuring the discharge of a mortgage, and seems to contemplate the necessity of perpetuating the evidence of payment, by a recorded discharge. R. S. 315–16.

B. N. Davis, for defendant.

The only question in this case is, whether the defendant, under the general issue, could give in evidence the fact of his having paid off the notes described in the mortgage, previous to the date of his deed to plaintiff. The plea was sufficient, after issue was joined to the jury, to determine whether an incumbrance existed when defendant gave his deed. The general rule is, if all the covenants in the deed are in the affirmative, the defendant may plead performance generally, but if any are in the negative, he must plead them specially. 1 Sw. Dig. 609; 2 Chit. Pl. 529, n. c; do. 545, see form; *Richardson* v. *Dorr*, 5 Vt. R. 16; *Potter* v. *Taylor*, 6 do. 676. The covenants declared on, being in the affirmative, the defendant, by pleading performance generally, comes within the rule. If there was any defect in the plea, it is cured by verdict. Cowen, 71; 1 Chit. Pl. 481.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The question in this case is, whether the evidence proved the issue on the part of the defence, and whether the decision of the court, thereon, was right.

The plaintiff, on reading the deed of the defendant and

the copy of the mortgage deed from Pennock & Dodge to Hutchins, would have been entitled to a judgment with nominal damages. It was competent for the defendant, however, to prove that the mortgage was paid off, at the time he deeded to the plaintiff.

The evidence introduced by him proved that the mortgage was paid off, and, consequently, was not an incumbrance on the land at the time he deeded to plaintiff, and this was the very question at issue. Payment extinguishes a mortgage, both at law and in equity. The charge of the court, therefore, on the pleadings and evidence, was undoubtedly correct, as the inquiry was not whether there was an *apparent* incumbrance on record at the time the defendant made the covenant declared on, but whether there was any incumbrance *in fact*.

The case of *Hoyt* v. *Swift*, 13 Vt. 129, did not present the question which arises in this case. In that case, Swift executed a note to be paid when an incumbrance was removed, and the court held, that when a party undertakes to remove an incumbrance, it should be done in the manner pointed out by the statute. Had the issue in that case been, whether there was, in point of fact, an incumbrance, undoubted proof of the payment of the mortgage money would have been satisfactory that there was no such incumbrance. The judgment of the county court is affirmed.

IDE & SMITH *v.* WILLIAM J. STANTON.

The statute of frauds and perjuries applies to executory contracts.

A written admission of a previous verbal contract, will satisfy the statute.

The evidence necessary to constitute a sufficient note or memorandum of a bargain, need not be confined to a single paper or document.

The written note or memorandum must, either by its own language, or by reference to something else, contain such a description of the contract as shall dispense with the necessity of resorting to parol evidence to supply any thing essential to give it validity.

A stipulated price enters into the legal contemplation of a bargain; and therefore a note or memorandum which does not furnish evidence of price, is not sufficient to take a contract of sale out of the statute of frauds and perjuries.

ASSUMPSIT on a contract for the purchase of wool. Plea, *non assumpsit*, and trial by jury.

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The plaintiffs introduced testimony tending to prove that in June or July, 1839, the defendant applied to the plaintiffs to purchase a quantity of wool; that the parties agreed upon the price per pound; that the plaintiffs then had on hand some portion of the wool, only, but how much did not appear, and that they stated that they expected to receive, soon, certain other parcels, which the defendant agreed to take, with that on hand; and that no part of the wool was delivered, and no money or other thing paid.

No evidence was introduced tending to show that, at the time of making said bargain, or before, the bargain was reduced to writing, or that any memorandum or note thereof, signed by said defendant, in writing, was made. Evidence was introduced by the plaintiffs, tending to show, that defendant agreed to take from three hundred to four hundred pounds of wool, at fifty cents per pound. The plaintiffs then introduced two letters from defendant to plaintiffs, and one from J. Ide, one of the plaintiffs, to the defendant, which were as follows:

"North Danville, 10 Oct. '39.

"Gent.—I received your letter of the 2d Sept. yesterday. 'In answer would say, that I have felt very disagreeably 'about the wool I bought of you. I bought the wool for Messrs. 'C. J. & B. F. Batchelder, and they agreed to furnish the 'money immediately. I also bought about $1500 worth, and 'paid out my own money, and have not received a cent of it, 'which puts me to a good deal of inconvenience. They have 'money due in Boston, but cannot get it at present. I am 'in hopes they will be able to furnish money soon. They 'tried to get money at the Bank but could not. You must 'keep the wool for security unless you have a chance to sell 'it; if so, let it go. You have not been used fairly, and it is 'a way I never use people when I do business for myself.

"Yours, &c.

WM. J. STANTON."

"North Danville, 11 Feb. 1840.

"Gent.—Please inform me by return of mail how many 'lbs. of wool there are at your store, which you expect me to 'have. Mr. Batchelder, the man I bought the wool for, has 'refused to take it, but I am in hopes that he will conclude

'to be up to his agreement; however, I expect to stick to 'my trade whether he does or not.

"Respectfully yours, WM. J. STANTON.

"Sheffield, Feb'y 12, 1840.

"Wm. B. Stanton, Esqr. — Sir: Yours of the 10th in- 'stant was duly rec'd, and in answer I will say there is not 'far from 350 lbs. of wool. Hope you will succeed in get- 'ting it off on your contract. I am in great want of the 'money. Respectfully yours, JOSEPH IDE.

The counsel for the defendant contended that if the testimony was all believed, the plaintiffs could not recover, by reason of the statute of frauds and perjuries; and thereupon the court directed the jury to sign a verdict for the defendant; to which the plaintiffs excepted.

T. Bartlett, for plaintiffs.

The only question in this case is, whether the three letters referred to, and made a part of the case, are a sufficient note or memorandum in writing, of the contract between the parties to take the case out of the operation of the statute of frauds and perjuries.

As to the kind of note or memorandum in writing, the statute is silent. And the question arises, what sort of a note or memorandum will answer the requirement of the statute? Must it express the consideration, the time and mode of payment, and all the terms, conditions, and particulars of the contract? It is obvious that such strictness is not required. The terms, note or memorandum, as used in the statute, mean nothing more than a short writing or token for the better remembering of the contract, that it may not rest in memory alone.

It has been held that the word bargain, as used in the statute, does not render so full and strict a statement of the constituent and essential members of the contract necessary, as the word agreement. 6 East, 307.

When must the note or memorandum of the bargain be made? The plaintiffs contend that it need not be made at the time of making the contract, but that it may be made at any time before action brought. It is well settled that the contract of sale may be collected from one or several writings

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or documents. 2 Starkie, 612; 10 Mass. 230. It is contended by the plaintiffs, that if, from the note or memorandum, (whether collected from one or from several distinct documents) it appears that a contract of sale was made, and that the party considers the contract as complete and ended, that is a sufficient note or memorandum, within the statute. 2 Starkie, 604. And if from the note or memorandum it can fairly be inferred that a contract for the sale of goods has been made, even though no consideration is named, it is sufficient to take the case out of the statute. 6 East, 307; 12 Mass. 122. If the statute required *the agreement* to be in writing, then the word agreement, in legal understanding, would have to be regarded as integrally incorporated with the consideration. 10 Petersd. 89. But courts have uniformly admitted parol and extrinsic evidence of its existence and quality. A. by written undertaking, promises to pay B. one hundred dollars, without expressing any consideration; but B. may prove the consideration by parol. And even where a fine, feoffment, or conveyance is made, upon an express consideration, a man may aver, by word, another consideration, provided such consideration be consistent with the consideration expressed.

From the letters, in this case, there can be no doubt that the defendant bought of plaintiffs the wool sued for. And if defendant's letters had expressed the consideration, that is, how much he had contracted to pay them, the letters would have contained the evidence of an agreement perfect in all its parts. But the plaintiffs insist that they may prove the consideration by parol; and that, if no price was agreed upon, they may prove the value at the time of sale, under the *quantum meruit* count.

A bill of parcels, in which the vendor's name is printed, and delivered the vendee, or a subsequent letter from the vendor, referring to the parcels, will take the case out of the statute. 2 Bos. & Pul. 238; 3 Taunt. 169; 15 East, 103.

Before the writing of the letters, which contain what is tantamount to an express promise of payment for the wool, defendant was under an honorary and moral obligation to pay; and it has never yet been decided that a moral obligation is not a good consideration for an express promise.

C. Davis, for defendant.

The statute does not, in express terms, require the memorandum to be drawn up and signed *at the time* of making the contract. It requires, however, the substance and terms of it to be reduced to writing — those very things, for instance, which it is incumbent on the plaintiffs to prove, in order to recover, and in proof of which, if by parol, perjury was to be apprehended. The letters admit not a single fact in detail, which the plaintiffs, in ordinary cases, would be bound to prove; such as the date of the contract, the price, the time, and mode of payment, &c.

The cases clearly show that the essential terms of the contract must appear from the writing, leaving nothing to be supplied by parol proof, the admission of which would let in the very mischiefs the statute was intended to prevent. 2 Kent's Com. 511; *Bayley & Bogart* v. *Ogdens*, 3 Johns. R. 399; *Champion* v. *Plummer*, 4 Bos. & Pul. 252; *Parkhurst* v. *Van Cortland*, 1 Johns. Ch. R. 280; *Abeel* v. *Radcliff*, 13 Johns. R. 297.

The opinion of the court was delivered by

ROYCE, J. — Two questions arise upon the bill of exceptions: 1. Whether the present is a case within the statute for the prevention of frauds and perjuries; 2. If it is, whether the written evidence produced upon the trial was sufficient to satisfy the requirements of the statute.

It was the prevailing opinion, for a time, that the statute applied only to contracts for the immediate sale and delivery of goods, and did not extend to any case of an executory contract. This distinction arose from what was said by the court in *Clayton* v. *Andrews*, 4 Burr. R. 2101. But since the decision in *Rondeau* v. *Wyatt*, 2 H. Bl. R. 63, no such general distinction has been recognized or acted upon. *Cooper* v. *Elston*, 7 T. R. 14; *Bennett* v. *Hull*, 10 Johns. R. 364. And in order to exempt an executory contract from the operation of the statute it has been required to appear, that the thing contracted for was to be manufactured by the seller, as in *Towers* v. *Osborne*, 1 Str. R. 506; *Crookshank* v. *Burrell*, 18 Johns. R. 58; *Sewell* v. *Fitch*, 8 Cowen 215; or that some important change in its condition was to be effected by him before delivery, as in the case first

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cited, where the sale was of a certain quantity of wheat, which remained to be thrashed by the seller before the contract could be executed. And it would seem that even these facts would not be sufficient in England, at this day, to take a case out of the statute. I infer this from the decision in *Garbutt et al.* v. *Watson*, 5 B. & A. 613, where the plaintiffs, being millers, contracted to sell to the defendant 100 sacks of flour, to be ground from their stock of wheat, subsequently to the contract of sale. It was held to be a case within the statute. The case at bar does not require us to go the length of this last decision. The plaintiffs had part of the wool on hand at the time of making the contract, and they relied upon collecting, and receiving in, the residue before the stipulated time of delivery. There is nothing in the case to justify us in pronouncing it a sale of non-existing property, or of property not then owned by the plaintiffs and subject to their control. It is, therefore, but the case of an executory contract, substantially like that of *Cooper* v. *Elston* already cited. We regard it as a case within the statute.

The exceptions state that no part of the wool was delivered, and no money or other thing paid. It was, therefore, a case, where a written "note or memorandum of bargain" became necessary. The statute has never required, that the written evidence of the purchase should be created at the time of making the contract. A written admission of a previous verbal contract will satisfy the statute. Neither is it essential that all the written evidence, necessary to constitute a sufficient note or memorandum of the bargain, should be comprised in a single paper or document. Distinct writings, and of different dates, if signed by the party to be charged, and properly conducing to prove the contract, are competent evidence in this class of cases. But since the whole object of the statute is to guard against the danger of fraud and perjury, in proving the contract, it is obviously indispensable that enough should appear in writing to show that a contract of purchase has been concluded, which is legally binding upon the party sought to be charged. The written note or memorandum must, therefore, either by its own language or by reference to something else, contain such a description of the contract actually made, as shall obviate the necessity of resort-

ing to parol evidence, in order to supply any term of the contract, which was essential to give it validity.

The defendant's letters, which are relied on as furnishing the requisite written evidence in this case, disclose the names of the parties, and the subject-matter of the purchase, but are silent as to the price agreed to be paid. This, it is insisted, was but the consideration of the bargain, which, according to *Egerton* v. *Matthews*, 6 East, 306, need not appear in writing. But in that case, the price was distinctly stated in the writing, and the question was, whether, as the contract could not have been enforced against the plaintiff, (for want of his signature to the memorandum) the defendant was bound by it, without some consideration, apparent upon the writing, beyond his own admitted obligation. It was decided that no such additional consideration was required to appear in writing. And this, it is believed, is the extent of all the decisions which have professed to follow out the doctrine of *Egerton* v. *Matthews*.

It is evident then, that the sufficiency of the note or memorandum under consideration, must depend upon the import of the word *bargain* as used in the statute. And its appropriate legal signification, independently of its connections with other expressions in the act, is the one to be sought. In this respect it differs from the word *agreement* as used in the same statute, which, from the peculiar phraseology of the section in which it occurs, has been held susceptible of a meaning somewhat short of its strict legal import, and to be synonymous with *special promise* or *undertaking*. *Smith* v. *Ide*, 3 Vt. R. 290. Now we find it laid down by Judge Kent and other writers upon the common law, when speaking of the legal requisites of a bargain, that "the price is an essential ingredient in the contract of sale, and it must be real and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties." 2 Kent's Com. 477. This accords also with the rule of the civil law, "that the price ought to be established, for there can be no bargain without a price."

Since a stipulated price is thus seen to enter into the legal contemplation of a bargain, we could not doubt, even in the absence of more direct authority, that when the statute came to require written evidence of the bargain, it intended that

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the price, like other essential terms of the contract, should be proved by such evidence. This conclusion, however, is not left to rest upon mere inference from the statute, since it is abundantly confirmed by the decisions both at law and in equity. *Blagden* v. *Bradbear* 12 Ves. 466; *Clark* v. *Wright*, 1 Aik. 12; *Bromley* v. *Jeffries*, 2 Vern. 415; *Elmore* v. *Kingscote*, 5 B. & C. 583. In these cases the memorandum was adjudged to be fatally defective, upon the sole ground that it did not disclose the price. It is needless to mention the numerous cases, where this defect has been noticed in connexion with others. It is manifest that the bargain, in this case, was not proved by the written evidence, and the judgment of the county court must be affirmed.

Judgment affirmed.

TOWN OF ST. JOHNSBURY *v.* TOWN OF WATERFORD.

The right of one town to recover of another, expenses incurred in the support of a pauper, is not affected by the residence of the pauper, during the pendency of the action.

It is not error in the county court, in stating in a bill of exceptions the charge given to the jury, to refer to another bill of exceptions, as containing the charge given in the case; it being but the making a copy of the charge in one case, a part of the bill of exceptions in the other.

The ability of paupers to maintain themselves is a pecuniary ability, and is not affected by the manner in which they have previously disposed of their property, if the disposition has been so made as to be binding on them.

The declaration of the pauper or her husband are not evidence in the case.

Towns have a right to recover of other towns chargeable with the maintenance of insane paupers, the expense of supporting them at an insane asylum, unless it increase the expense of maintenance.

Towns may recover, in like manner, for clothing destroyed by an insane pauper, without fault of the overseers or keepers.

Towns may, in like manner, recover for money paid to other towns for the support of paupers upon orders of removal, afterwards vacated, if it do not exceed the expense of keeping in the town procuring the removal.

THIS was an action of assumpsit for the recovery of certain expenses, incurred by the plaintiffs, in boarding, taking care of, and doctoring one Caroline C. Rowell, alleged to be a transient person, founded upon the 12th section of the act in relation to the support and removal of paupers. The gen-

eral issue was pleaded and joined to the country. By the schedule of claims filed by the plaintiff, it appeared that the expenditures commenced June 12, 1840, and terminated in October of that year.

The plaintiff introduced evidence tending to show, that the said C. C. Rowell was the wife of one Samuel Rowell, Jr.; that they were lawfully married, on or about the 5th of January, 1834; that said Samuel Rowell, Jr., was the son of Samuel Rowell, and was born on or about the 30th of May, 1808; that the father moved into Waterford about the month of January, 1815, and continued to reside there about three years; that said Samuel Rowell, Jr., in May, 1840, while residing with his wife and several children, at Concord, Vt., entered into a bargain with his brother, James C. Rowell, to the effect that he sold and conveyed to the said James his farm, valued at $1000, all his stock, farming tools, and every other kind and description of personal property whatever, except one bed and one cow, in consideration of which, said James agreed to maintain and support, during minority, his, said Samuel's, children — no support being stipulated for the wife—and pay all the then existing debts owing by said Samuel; that, about the same time, he carried his wife to her father's, Enos Page's, in St. Johnsbury; that she remained there a short time, and then went to the house of David Goodall, in St. Johnsbury, who finding her to be insane, at times, and very troublesome, reported her situation to Mr. Lee, one of the selectmen of the town, with a view to obtain support for her from the town; that said Lee made known her situation to Lambert Hastings, overseer of the poor of said town, who proceeded to provide for her in behalf of the town; that said Goodall charged nothing for her support, while she resided with him; that, some time afterwards, an order of removal was made, by the procurement of said St. Johnsbury, of said C. C. Rowell, to the town of Kirby, who took an appeal to the county court, and such proceedings were had that said order of removal was reversed; that she was maintained some time at the poor-house in St. Johnsbury, and then taken by the overseer of the poor, to the insane hospital, at Brattleboro, where she remained about three months, and then, without material abatement of her insanity, was brought back to St. Johnsbury, where she remained, supported by

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the town, until the bringing of this action; that said Samuel soon after said bargain, left the state and remained absent ten months, when he returned to Concord and lived in the family of said James C. Rowel, and with his own children, until the spring of 1842, when he, with his children, removed to Bradleyvale, Vermont; and that James paid several of Samuel's debts.

Defendant's counsel, on cross-examination of one of plaintiff's witnesses, inquired what he heard Samuel say, since said conveyance and sale to his brother, about the character and object of said sale and conveyance; which was objected to by plaintiff's counsel, and rejected by the court. Defendant's counsel also inquired, on cross-examination of the witness, what he had heard said Samuel say, since said conveyance, he was worth when he made it. This being objected to, was rejected by the court.

The defendant's counsel objected to the admission of evidence, in support of the charges in the schedule for money paid the town of Kirby, for support of the pauper, and for articles destroyed by said C. C. Rowel, being her own apparel, and for expenses of transporting her to and from Brattleboro, and while residing there. The court overruled the objection and admitted evidence to these several points.

The defendant introduced evidence tending to show, that when said Caroline C. Rowell was carried by her husband to said Enos Page's (her father's) house; she remained there about three weeks, for which he charged nothing, and that he did nothing towards throwing her onto the town for support; that Samuel Rowell, Jr., at the time he transferred his property to his brother, was worth from $400 to a $1000; that he was a healthy, able-bodied man; that when he removed with his children to Bradleyvale, he took with him several articles of property, which he had previously transferred to his brother James; that he had resided in the town of Concord, Vermont, seven years, continuously, previous to the bringing of this action; that from the time of his marriage, he resided in said Concord, till he sold out to his brother in 1840; and that after his return from out of the state, in March, 1841, he continued to reside there till May, 1842.

The counsel for defendant requested the court to charge the jury, that if they should find that the conveyance by S. Rowell, Jr., to his brother, was in trust, merely, for the support of his children, to the exclusion of his wife, they should not regard him as being divested of such property, in reference to the question of his ability to support his wife; that, if the jury should find that said Samuel had resided seven successive years in said Concord, next preceding the trial of this cause, the plaintiffs could not recover; and that the absence from the state nine or ten months, leaving his children in Concord, would not constitute, in law, any interruption to his residence there, with reference to the question of gaining a settlement. The court refused to charge as requested; but instructed the jury as follows: — There was testimony given in the case, by the plaintiff, tending to show, that said Samuel Rowell, Jr., at the time he sold his property to his brother, had very little more than sufficient to pay his just debts, which his brother was to have paid, and has since paid; and the jury were charged, that the question, whether said Samuel, Jr., was of sufficient ability to maintain his wife, at the time she was supported by the plaintiffs, and to pay the plaintiffs therefor, was a question for them to determine, upon all the circumstances in the case; that the ability spoken of, was, in the statute, a pecuniary ability, which must have been such as would enable him to have paid the expense of his wife's support at the time; that, if he had, before the time of such expense incurred by the plaintiffs, wholly divested himself of all his property, by assigning the same, absolutely and unconditionally, to his brother, for the payment of his debts and the maintenance of his children, and that, thereafter, he had no interest in, or control of, the same, such property could not be taken into the account in determining his ability to pay such expense; that the fact of said Samuel, Jr.'s having resided in said Concord seven years, next before the trial of this action, was unimportant, provided such residence was not completed before the commencement of the action and the accruing of the expense. The legal import of the term "residence" was explained in the same manner as it was in *Kirby* v. *Waterford*, and in a manner not objected to by the counsel for Waterford; and in regard to the absence from the state, the jury were told it would depend upon the existence

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or not of the *animus revertendi*, as explained in that case. In regard to clothes destroyed by the pauper and replaced, the jury were told if that happened without any fault of the plaintiffs, they might be recovered for, so far as they were necessary, and that the expense of keeping the pauper by Kirby, and paid by the plaintiffs, if it did not exceed what they must have expended in keeping her at home, might be recovered; and so, also, of the expense of maintaining her at the asylum, and transporting her there and back again. To which decisions, and charge of the court, the defendant, after verdict and judgment for the plaintiff, excepted.

C. Davis, for defendant.

It was indispensable that the plaintiff should show that the town of Waterford was the place of legal settlement of C. C. Rowell, at the time of furnishing the support, or at the time of bringing the action — we think the latter. The county court instructed the jury that a residence of seven years, continuously, of S. Rowell, Jr., in Concord, previously to the bringing of the action, which the case shows to have been proved, would not avail the defendants unless it were also shown that the septenary was completed before the expenditures were made. If this is to be understood as meaning before the expenditures commenced, it was clearly erroneous. The specification of plaintiffs' claims, made a part of the case, shows that the support commenced June 12th, 1840, and continued without interruption, reckoning the short residence in Kirby under the order of removal, and the long residence at the insane hospital, at Brattleboro, as a continued support, as the plaintiffs do, until the bringing of the action in October of the same year. If the court meant the termination of the period of support, the jury should have been informed, that if they believed the evidence which tended to prove a continued residence of S. Rowell, Jr. in Concord seven years previously to the bringing of the action, the town of Waterford was not the place of legal settlement of the transient person, and their verdict should, of course, be for the defendant. As no evidence seems to have been introduced tending to prove the contrary, it appears impossible to account for the verdict on any other grounds than the

want of explicit instructions on this point. Manifest injustice seems to have been done by it.

On the question of the inability of Rowell to support his wife, we think the instructions requested by defendant's counsel should have been given. They were, that an assignment in trust, for the support of his children, (leaving his sick wife unprovided for) of all his property real and personal, with the exception of one or two trifling articles, especially when that property amounted to so considerable a sum as in this instance, could not be regarded as divesting him of ability to support his wife, provided the possession of the property could be considered as conferring such ability. It is true the court do not, in express terms, negative this proposition. They say 'if he, Rowell, had wholly divested himself of all his property, by assigning the same, absolutely, and unconditionally to his brother, for the payment of his debts and the maintenance of his children, and that, thereafter, he had no interest in the control of the same, such property could not be taken into the account,' &c.

But the fact of the sweeping character of the assignment—its being made to a near relative—the purpose to which it was to be applied—the fact of the sudden return of Samuel, after his wife had become quartered upon the town of St. Johnsbury, and a controversy between that town and Waterford in relation to her support had sprung up, and his settling down with his children upon the real estate he had conveyed away, and his resumption and carrying away with him, some time after, of a portion of the personal property he had sold—afforded such cogent reasons for believing that the assignment was merely colorable and collusive, or was in trust for certain purposes, that the defendants were entitled to specific instructions as to the effect, if the jury should adopt the conclusion to which these facts strongly tended.

There is manifest error in refusing to instruct the jury, in relation to the question whether Rowell's leaving the state for 9 or 10 months, under the peculiar circumstances indicated by the evidence in this case, would or would not, interrupt his residence in Concord, where all his family, except his wife, remained, in contemplation of the act which confers a legal settlement as a consequence of seven years continued residence.

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The request made by defendant's counsel was fully justified by the evidence, if believed.

But the court contented themselves by alluding to the '*animus revertendi*,' as explained in the case of *Kirby* v. *Waterford*. Of that explanation we can take no notice here. The records and files in that case are not made a part of this case, and cannot therefore be referred to, to show what instructions were given in this. This point was material, as there was evidence that Rowell commenced his residence in Concord sometime previous to his marriage in January, 1834, and continued it, if this absence did not interrupt it, till after this suit was instituted; and, from its nature, it was one which peculiarly required elucidation by the court.

The court erred also in excluding, on cross examination of one of the plaintiffs' witnesses, testimony as to the admissions of S. Rowell, Jr., made after the conveyance to his brother, as to the character and objects of that conveyance. His declarations subsequent to the conveyance, seem to have been excluded, upon a supposed but mistaken analogy between this case and those where the conveyances are impeached for fraud, in which latter cases, *expost facto* declarations of the grantors are, with great propriety, not admitted to defeat the rights of the grantees.

As to the sum paid to the town of *Kirby* for the support of Mrs. Rowell, while remaining there under an order of removal, afterwards vacated — the expenses of transporting her to and from Bratleboro and supporting her while there at the asylum — the destruction of clothing and other property by her while in the poor-house at St. Johnsbury, we say that each and all of these classes of expenditures seem to be wholly irreconcileable with the terms and scope of the 12th section of the statute.

——— ———, for plaintiff.

The opinion of the court was delivered by

REDFIELD, J. — The great number of questions arising upon this bill of exceptions seems to require that they be very briefly disposed of in the opinion.

1. It is objected to the proceedings in the court below, that it does not appear that Caroline C. Rowell's legal settle-

ment was in the town of Waterford, at the time the expenses were incurred. But it does appear by the bill of exceptions, that it was conceded, at the trial, that such was the fact, unless defeated by seven years' residence, in Concord. The jury were told that, unless this residence was completed, before the expense incurred, or the bringing of the action, it would not affect the right of recovery. They have, then, negatived that fact.

2. There is no objection to the charge in defining the term, "residence," except the reference to the other bill of exceptions, by the judge. We do not understand, by this, that the jury were referred to the exceptions in the other case, but only that the judge, in drawing up the case, to save the labor of writing out the charge twice, put both cases on this point, where they were precisely parallel, upon the same bill of exceptions. Nothing is more common than to try two, or more cases, in this court, upon one bill of exceptions. We see no more objection to referring to another bill of exceptions, as part of the case, than to a copy of record, or an original contract. It is but making a *copy of the charge*, in the other case, a part of this.

3. We think the charge, in regard to Rowell's ability to support his wife, correct. He had effectually disposed of all his property; and the mode was unimportant, as it was binding upon him, and upon all others, unless done to defeat their rights, which it does not appear was attempted to be shown in the present case.

4. The declarations of Rowell, the husband of the pauper, were mere hearsay.

5. As to the sums paid to Kirby, and at the insane asylum, they cannot be objected to, as they did not increase the expense of her maintenance. And if the expense had been positively increased, by sending an insane pauper to the asylum, I have no doubt, it would, under the present enlightened views, upon the most judicious and humane mode of treating such cases, be considered necessary expense of comfortable support. I trust, indeed, the *state* is not prepared to establish a system of treatment of insane paupers, which would be esteemed disgraceful in the case of *relatives* of sufficient ability.

6. The expense of clothing, destroyed by the pauper, was

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not only necessary, but indispensable to decency. This expense must be borne somewhere. Of course it must come where the principal burden of expense of maintenance falls.

Judgment affirmed.

ABRAHAM SANBORN *v.* CALVIN MORRILL.

A sale of a personal chattel, by one tenant in common, is not such a destruction of the chattel, as to enable the other tenant in common to maintain an action of trover against the purchaser. cotenant ?

THIS was an action of trover, in which the plaintiff claimed to recover the undivided half of four hundred pine mill logs. Plea, general issue, and trial by jury.

On the trial the plaintiff offered to prove that he was tenant in common of the logs sued for, with one Isaac M. Sanborn; that said Isaac M., by an instrument in writing, pledged his interest in the logs to the defendant, to secure a debt he owed him; that the defendant, without the knowledge or consent of the plaintiff, took the logs from where they were lying on the bank of a river, and floated them some miles to a saw-mill, and had them sawed into boards, and sold the boards, and took the pay for them, and refused to account, in any way, with plaintiff for the avails of the sale, and denied the plaintiff's right in the logs. This testimony was objected to by the defendant, as not being sufficient to entitle the plaintiff to recover in this action, and the court so decided, and rejected the evidence; to which the plaintiff, after verdict and judgment for the defendant, excepted.

N. Baylies, for plaintiff.

I. By the writing signed by Isaac M. Sanborn, it appears that he turned out his undivided half of the mill logs as collateral security. As no time is mentioned when the *pawn* was to be redeemed, the said Isaac M. had his whole life to do it in, unless compelled to do it sooner, either by an order of a court of chancery, at the instance of the pawnee, to sell the pawn to raise money to pay the debt, or by the power of the pawnee to sell the property, after demanding payment

and giving reasonable notice that, upon non-payment, he should sell. But no such proceeding was had by the pawnee before the logs were sawed and the boards sold. This was a *tortious* act of Morrill — a conversion of the logs to his own use. For this act the pawnor may maintain *trover*. 2 Kent's Com. 452; 1 Swift, 332; Story on Bailment, sections 303, 8, 9, 10, 348, 9, 350, 2; 2 Caine's Cas. in Error, 200; 10 J. R. 471; 12 J. R. 146; 3 Peters, 256.

II. There is a plain distinction between a mortgage, and a pawn, of a chattel. If it be mortgaged, the general property passes to the mortgagee subject to the condition. But if pawned, the general property remains in the pawnor, and the pawnee acquires only a special property, which gives him no right to transfer the general property, except in one of the two ways above stated. Morrill, without complying with either of these ways, sawed *all* the logs into boards, and sold the boards, and received the pay for them, and refuses to render any account to the plaintiff for his undivided half which were not pawned, and in which Morrill never had any special property. If Isaac M. Sanborn had a right to maintain trover for the conversion of his undivided half by Morrill, then the plaintiff has a right to maintain trover for his undivided half, which were not put in pledge, but have been converted by Morrill to his own use.

III. But we go further, and say, that Isaac M. Sanborn, by placing his undivided half of the logs in the hands of the defendant, as *collateral security*, did not vest in the defendant any property in them, which made him a joint owner with the plaintiff; for, after pawning the undivided half, the general property in that half remained in Isaac M. Sanborn, and he and the plaintiff were still the joint owners of the logs. The defendant acquired only a *lien* upon the said Isaac's undivided half, but no ownership. It cannot, therefore, be said that this action of trover is between joint owners; but it is between a joint owner and one who, without right, converted the logs to his own use.

IV. It is not pretended that the defendant destroyed the logs; but he put them and their avails as much beyond the reach of the plaintiff as he would have done if he had burnt them. In the case of *Wilson & Gibbs* v. *Reed*, 3 J. R. 175, Spencer, J., says, "that an action of *trover* will lie by one

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tenant in common against another, for a destruction of the chattel, or for its loss, whilst under his management, has not been controverted; but a distinction has been attempted between a sale of the chattel and a *tortious* destruction — a distinction, I think, not maintainable. Tenants in common of a chattel have, each, an equal right to the possession, and the law will not afford an action to the one dispossessed, because his right is not superior to that of the possessor." If there be two tenants in common owning equal shares in a vessel, and one tenant, without the consent of the other, tortiously applies a fire-brand to the vessel, and burns it to ashes, it would be *destruction* of the vessel; or, if, for his own use, and benefit, without the knowledge or consent of the other tenant, he tortiously send the vessel to sea, and it be lost — in either of these cases, it is admitted he would be liable to pay his co-tenant for his undivided half; but if he *tortiously* send the vessel ten thousand miles across the ocean, and sell it in a foreign port, without the consent of his co-tenant, and comes home, and makes known what he has done, would he not be liable to pay his co-tenant for his undivided share? This question seems to be answered in the decision of the case, *Tubbs* v. *Richardson*, 6 Vt. R. 442, which was an action of *trover*, for an undivided half of sixty-eight pounds of wool, of which the plaintiff and defendant were tenants in common; in which it appeared that the defendant had sold twenty-eight pounds of the wool, and had the other forty pounds in his possession. The judge, on giving the opinion of the court, takes up the decided cases, and says, "The weight of authorities now is, that the sale of the whole chattel owned in common, by one tenant, is a conversion." "But no intimation has been thrown out, by any judge or elementary writer, that the sale of less than the whole is such conversion." "There was no sale save twenty-eight pounds, which was less than half; and all the cases of sale go expressly on the ground of the sale of the whole." "The defendant has not, therefore, in law, been guilty of the conversion of the property in question." See 5 Barn. & Ald. 395; 3 Stark. Ev. 1495.

Upham & Hibbard, for defendant.

We maintain, first, that an action of trover cannot be main-

tained by one tenant in common against his co-tenant, unless the property be *destroyed* by the defendant; and, secondly, that the sale of the whole property by one co-tenant, is not such a destruction of it as will enable the other to sustain trover. *Tubbs* v. *Richardson*, 6 Vt. R. 442; 12 do. 681; *Danforth* v. *Webb*, 1 Day's R. 301; *Oviatt* v. *Sage*, 7 Con. 95; *Heath* v. *Hubbard*, 4 East, 110; *Jackson* v. *Anderson*, 4 Taunt. 24, 30; *Muddock* v. *Goddard*, 15 Maine R. 218; *Cubit* v. *Porter*, 15 C. L. R. 211; *Fellowes* v. *Ld. Granville*, 1 Taunt. 241; *Wilbraham* v. *Snow*, 2 Saund. 47, n. *g.*; 1 Coke Litt. 200–6, 908–9; 1 Swift's Dig. 170–1; *Messeter* v. *Norton*, 15 Johns. R. 179; *Herrin* v. *Eaton*, 13 Maine, 193; *Seldon* v *Hickock*, 2 Caine's R. 1 Salk. 289; 2 Cowp. 140; 1 Term. R. 658.

Again, the logs were designed for the mill, and the defendant had a right to cut them into boards or plank, and sell them. It is well settled, we apprehend, that the conversion of a chattel by a tenant in common to its general and profitable application, though it changes the form of the substance, is not such a *destruction* of it, as will enable his co-tenant to sustain trover for it. It is well laid down, we think, in *Martin* v. *Knoullys*, 8 T. R. 145, that a tenant in common may make any fair profit of the common chattel. What profit could be made of the logs in question, if they could not be cut into boards and sold? None, most certainly. The authorities to which we have referred, show that the plaintiff has another remedy in this case.

We are aware that the case of *Weld* v. *Oliver*, 21 Pick. R. 559, is opposed to the doctrine for which we contend. But that case, we think, was not decided upon common law principles. The judge who delivered the opinion seemed to think the common law doctrine, that a sale in such cases is not a conversion, much weakened by the case of *Barton* v. *Williams*, 5 Barn. & Ald. 395; but that case presented other questions, and, in the final disposition of it, the question arising in this case was not settled.

In the case of *Wilson & Gibbs* v. *Reed*, 3 Johns. R. 175, the question was decided against us; but no adjudged case, the court will perceive, was cited to sustain the doctrine adopted by the court.

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The opinion of the court was delivered by

HEBARD J. — For the purpose of considering this question, the facts offered to be proved by the plaintiff, and excluded by the court, must be considered as true. The defendant, then, stood in the same relationship to this property that Isaac M. Sanborn did, so far as the plaintiff's interest in the property comes in question. And the plaintiff and the defendant became tenants in common of the property; for when Isaac M., transfered to the defendant his interest in the logs, the latter stood in the place of Isaac M.; and if he transcended the power and right conferred upon him by Isaac M., still that would not necessarily affect the legal rights of the plaintiff.

It seems to be conceded by the counsel, and so are the authorities, that one tenant in common, of personal property, may maintain trover against his co-tenant, for a destruction of the property. So that the question to be determined, in the present case is, whether a sale of the chattel, for this purpose, is equivalent to its destruction.

The question upon which the case is to be determined, belongs to the class of *technicalities*; for if the facts exist which the plaintiff offered to prove, there is no doubt that the plaintiff is entitled to some sort of remedy; and the question is, in relation to the *form* of the action. In other words, the question is, whether the remedy shall be by action, *ex delicto*, or *ex contractu*. And upon this point, the authorities, to some extent, are conflicting; and the case, like many others, must be settled by the weight and current of authorities. If the question was entirely *res integra*, it could not be regarded as very important, which way it should now be settled; but the doctrine of *stare decisis*, even in matters of *form*, and *technicalities*, is not to be disregarded.

In determining this question, one or two points here are worthy of consideration, before proceeding further. We have already remarked, that this action may be maintained for a destruction of the property, by one tenant in common, against his co-tenant; and those authorities which sustain the action, do so upon the notion that a *sale* is equivalent to *destruction*. I think there is a difficulty in sustaining the action upon this ground. If the defendant had no right to sell this property, then his attempting to do so, did not divest

the plaintiff of his interest in it; and while the plaintiff had an interest in the property, so that he could pursue it, I cannot see how it can be said that the property was destroyed. There can be no destruction of the property arising from the sale, only upon the supposition that the defendant was authorised to sell it; or, having sold it, that the plaintiff has ratified the sale; and, in either of these cases, it would not be pretended that the plaintiff could maintain trover; but the action should be in form, *ex contractu*.

Another reason exists in this state, that does not in some other states, why the action should not be sustained upon doubtful authority; and that is, the distinction which our statute has made between actions founded on contract, and those founded on tort, the body being free from arrest in one case, and not in the other.

There have been a variety of decisions, bearing upon this case. The plaintiff relies upon *Wilson & Gibbs* v. *Reed*, 3 Johns. 175. In that case, Judge Spencer says, that "for a sale of a chattel, an action of trover will lie, by one tenant in common against another." The question, however, is very little discussed by the Judge in giving this opinion; but he is merely understood to affirm the opinion and charge of Judge Kent in the circuit court, who there says that "the presumption is that the rum had been retailed by the defendant, which in law, was a destruction"; and whether the nature and kind of property, had anything to do with the propriety of sustaining the action, in the minds of either court, does not appear; but it seems to have been sustained upon the principle, that the *sale* was a *destruction* of the chattel. The case of *Weld* v. *Oliver*, 21 Pick. 559, is also a prominent authority relied upon by the plaintiff, and there is no doubt but it goes as far, at least, as the case under consideration. But there will be some difficulty in following out that case. The case goes upon the ground, that there must be a destruction of the property; and still Judge Dewey goes on to show that the property, in that case, still had a legal existence. He says that "the unlawful sale by the first vendor, of the property, does not necessarily impair the rights of the other co-tenant, or pass any title, unless he ratify the sale." It would be difficult to understand how, in a legal sense, there can be a destruction of the plaintiff's prop-

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erty by a sale, which does not even "impair his right or pass any estate." And he goes on to say, "that you may proceed by action, either against the first or any subsequent vendor."

The two cases above cited, if followed, would, without doubt, be authority to sustain the present action. But it is believed that the weight of authority is the other way; and such authority, too, as we are not at liberty to disregard.

The English authorities, though not as decisive and not as much to the point as might be desirable, if they alone were to be relied on, go very far to sustain the doctrine, that for a *sale* by a tenant in common, his co-tenant cannot maintain trover, but that there must be a *destruction* of the property. The case of *Oviatt* v. *Sage*, 7 Con. 95, holds the converse of the doctrine which is attempted to be established by the two cases before cited. In that case, *Oviatt* and *Cobb* were tenants in common of a quantity of cheese, and Cobb sold the cheese to Sage, and Sage disposed of the cheese in market, and refused to account with Oviatt, who sued him in an action of account, and the objection taken, was that it should not have been *account* but *trover*, the sale being a destruction of the property. But the court, (Judge Daggett,) denies that doctrine, and says that nothing short of a destruction of the property will make a co-tenant liable in trover; and, in short, that a *sale* is not equivalent to a *destruction* of the property. In the case of *Oviatt* v. *Sage*, the court seem to put some stress upon the fact, that the property, in that case, being cheese, was intended for market, and that the sale of the article was in accordance with its original destination. I apprehend that consideration is not altogether unimportant; and if important in that case, it is equally so in the present. These pine logs were useful to the owners, only as an article of traffic and sale. The case of *Webb* v. *Danforth*, 1 Day, 301, is to the same import; and also Swift's Dig. 170. All go upon the ground that the sale of the chattel makes the purchaser co-tenant with the other owner, and does not pass his title to the property. And such is the reasoning of Judge Dewey, in the case of *Weld* v. *Oliver*.

When one tenant in common makes sale of the whole chattel, the other tenant has his election, either to disaffirm the sale, and stand as co-tenant with the purchaser, or to affirm the sale, and call the seller to his accounting for the

proceeds. And when he ratifies the sale, it ceases, of course, to be a tortious act.

But there is another view of this case, aside from the authorities to which I have referred. We are disposed to regard this as not an open question. The case of *Tubbs* v. *Richardson*, 6 Vt. R. 442, has settled the law in this state; and, to sustain the present action, would overturn the whole doctrine of that case. There is but one feature in that case to distinguish it from the present, and that is not of the essence of the question. In that case, the whole of the property thus owned in common, was not sold. But that cannot alter the principle. It was not upon that principle that the action in 21 Pickering, was sustained, for, in that case, the whole of the salt was not sold. The only reason for such a distinction is, that if less than half is sold, it may be considered as working a severance of so much of the property, if it is a commodity susceptible of being severed. But that argument is answered by saying, that the authorities agree that one tenant in common cannot compel a severance.

In the case of these logs, there was no tortious taking, for one tenant in common has as good a right to the possession as the other; and each tenant owned an undivided half of each log, and so it was in the case of the wool. The right of action, then, could not be made to depend upon the fact, whether the whole, or only a part, of the property was sold. If selling the whole would be unauthorized and tortious, so equally, in principle, would be the selling a part. When this distinction is disposed of, the two cases are parallel. And this is a *distinction* without a *difference*. And even if it might be said that a different determination of that case should have been made, that will avail us nothing, unless we now come to the determination to overrule that case. But the case of *Isaacs* v. *Clark*, 12 Vt. 681, shows that the court had no disposition to disturb the doctrine settled in the case of *Tubbs* v. *Richardson*. And although, as is said, the reasoning of Judge Bennett in that case was not called for by the question to be decided, it shows that the court were disposed to adhere to the doctrine. As we have already said, we consider the law upon this point settled by the case of *Tubbs* v. *Richardson*; and if the doctrine of *stare decisis* is worth preserving, the conclusion, in the present case would seem to be inevitable. Judgment of the county court affirmed.

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ROBERT KELSEY *v.* TOWN of GLOVER.

In an action against a town, to recover damages occasioned by the insufficiency of a road, it is a question of fact, or a mixed question of law and fact, whether the road was out of repair, — as, also, whether the town was justly chargeable with neglect of duty, — whether the plaintiff's injury was caused by such want of repair, — and whether the plaintiff used proper exertions to avoid the injury.

It is the duty of a town, in the construction and repair of roads, to provide for the reasonable safety of travellers in reference to such accidents as may be expected to happen on such roads.

THIS was an action on the case, brought to recover for damages alleged to have happened to the plaintiff's property, by reason of the insufficiency and want of repair of a highway in Glover. Plea the general issue, and trial by jury. The case was brought into this court upon the following bill of exceptions:

The plaintiff, in support of the issue on his part, adduced evidence tending to prove, that, at the time mentioned in his declaration, he was, with his team, consisting of a span of horses and a double sleigh, travelling along on the public highway described in his declaration, within said town of Glover; that one Locke was driving a single sleigh just before him, the said Kelsey; that the said Kelsey was driving his team up a short hill, on said highway, close behind the said Locke, and that a frightened horse, harnessed in a single sleigh, without a driver or any person in said single sleigh, was furiously running on said highway towards the said Locke and the said Kelsey; that the said Locke turned his horse partly out of the road and said frightened horse passed swiftly by him, and, in passing the team of the said Kelsey, thrust one of the shafts of said single sleigh, to which he was attached as aforesaid, into the side of the said Kelsey's near horse, just forward of his hind legs, and killed him.

The plaintiff, in further support of said issue, adduced evidence tending to prove, that two tree tops lay beside said highway nearly opposite each other, and that his sleigh was on said highway, between said tree tops, when said frightened horse came upon him, and that some part of the tree top on the east side of said highway, the side on which said

frightened horse attempted to pass, projected so far into the road, and over the road, and so obstructed the passage along the side of said highway, that said frightened horse was turned upon and against the plaintiff's horse, and killed him in the manner before stated.

The plaintiff produced further evidence, tending to prove that said tree tops had been permitted to lay beside said highway for some two or three months before the injury complained of in the plaintiff's declaration, happened; and that there was not room enough between said tree tops for two teams to pass each other.

The defendants, in support of said issue on their part, adduced evidence tending to prove that there was sufficient room in the road between said tree tops on said highway for two loaded teams to pass each other without difficulty, and in perfect safety; and that a number of loaded teams did, just before, and just after, said injury to plaintiff's horse, pass each other on said highway, between said tree tops, without any inconvenience, difficulty, or trouble.

The defendants adduced further evidence tending to prove that the plaintiff's team had passed said tree tops up the hill about twenty or twenty-four feet, at the time the frightened horse came upon the plaintiff's horse, and that the plaintiff did not attempt to turn his horse out of the travelled path on said highway, when he saw the frightened horse running towards him, and when the said Locke turned out, although there was sufficient room to turn out, and no obstruction to prevent it.

The defendants further adduced evidence tending to prove that, when the injury happened, the plaintiff's team was standing still in the travelled path on said highway, and that on the east side of the highway, against the plaintiff's team, and along the side of it, there was unobstructed room sufficient for a yoke of oxen attached to a loaded cart to pass by and come into the road above the aforesaid tree tops, and that on the west side of the highway, opposite plaintiff's team, there was room sufficient for any loaded team to turn out of the travelled path without trouble or difficulty.

The defendants adduced further evidence tending to prove that their said road or highway was sufficient, and in no way out of repair, and that the plaintiff's horse was killed by un-

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avoidable accident; and that said tree tops, in no way or manner, contributed to produce the injury; and further, that said tree tops, before the injury happened, had been well and sufficiently cut out and removed from the road.

No further testimony was adduced in the case on either side. The counsel for the defendants contended, and requested the court to charge the jury, as follows, viz:

1. If the jury find that plaintiff's team was passing along said highway between said tree tops, when said frightened horse came upon him and his horse, and that there was sufficient room in the road, between said tree tops, for two loaded teams to pass each other in safety, without difficulty or inconvenience, their verdict should be for the defendants.

2. That towns are not liable for damages happening upon their roads and bridges, when they are kept in such a state of repair as to enable persons, in the exercise of common and ordinary prudence, to travel upon and over them with their teams and carriages in safety; and that the plaintiff cannot recover in this case, if the jury find that the highway in question, where the injury happened, was in such a state of repair as to enable persons, with teams under their control, to pass by other teams, on said road, under the control of drivers, without inconvenience, and to pass along safely upon said highway.

3. If the jury find that the plaintiff had passed said tree tops some twenty feet or more, and that his team was standing still, in the travelled path on said highway, when said frightened horse came upon him and his horse, and that there was room sufficient on either side of plaintiff's team for said frightened horse and cutter, or any other team, to pass without running upon and against plaintiff's team, he cannot recover in this action.

4. That a person travelling upon a public highway, with his team of horses, connot recover of the town for an injury inflicted upon his horses, by a frightened horse, breaking from his driver, and running upon, and injuring such traveller's horses, or either of them, provided there is no obstruction on said highway, to prevent such person, travelling with his team of horses as aforesaid, from turning out of the travelled path of said road, for the purpose of giving such frightened horse a chance to pass by him.

Whereupon the court refused to charge the jury, as requested by the counsel for defendants, and charged as follows, to wit: —

The court instructed the jury that if the road, at the place where the injury happened, was, by the defendants, suffered to remain out of repair, and insufficient for the ordinary safety of travellers and their teams; that this insufficiency or want of repair produced the injury to plaintiff's horse; and that plaintiff himself was guilty of no want of ordinary care and prudence, in the conduct of his team, or in attempting to escape the injury, the plaintiff was entitled to recover the value of his horse.

In further illustrating these several propositions, the court remarked to the jury, that towns were bound to build and repair their roads, in such a manner that they would be reasonably safe for the amount and kind of travel which might fairly be expected on them, and to enable travellers to be reasonably safe from the consequences of such accidents as might be justly expected, occasionally, to occur on such roads, i. e. such accidents as might be expected always to occur on such roads, at short intervals, or every few years, and which might be expected at one time as well as another. That it did not follow, of course, that because two loaded teams with care, might pass each other with safety, that the road was not out of repair at the the point of the tree tops before mentioned. And further, that although the road was sufficient for ordinary travelling, with kind horses, and good harnesses, and skilful drivers, yet, if the road, by reason of those tree tops, was unsafe and insufficient with reference to such teams, and such accidents, as might reasonably be expected to be found on such a road, and the accident in this case was of that character, then this point of the case would be made out, if this insufficiency and want of repair had been suffered to remain an unreasonable time.

On the second point, that if the accident occurring in this case, of the frightened horse breaking from his driver and running furiously along the highway, was of the class of accidents above defined, and the tree top on the east side of the road, operated to produce the injury to plaintiff's horse, by crowding the frightened horse upon plaintiff's horse, and that, had that been sufficiently cut away, i. e. as far as it was the

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defendant's duty to cut it away, as above defined, the injury would not have happened, then this point of the case was made out.

On the third point, that if the plaintiff did all that a man of common prudence and skill could be expected to do, under the circumstances, to escape the consequences of the accident, then this point was made out, notwithstanding there was more space on the west side of his sleigh, where he might have turned out his horses and sleigh, had he had sufficient time and warning for that purpose.

To all which the defendants, excepted. The defendants interposed a motion in arrest of judgment, which was overruled by the court; to which the defendants also excepted.

Upham, for defendants.

The exceptions in this case were taken to the charge of the judge in the court below, and also to his refusal to charge as requested by the defendants' counsel.

1. Towns, I admit, are answerable for "any special damages which shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge," which they are bound to support.

What is the legal measure of duty on the part of a town to the public, in relation to its roads and bridges? It is, I insist, nothing more nor less than this: a town is bound to keep its roads and bridges in such a state of repair as to render them reasonably safe for travellers.

Common and ordinary care and diligence in their construction and preservation is all that the law requires. *Townsend* v. *The Susquehannah Turnpike Co.* 6 Johns. R. 90; *Richardson* v. *Royalton and Woodstock Turnpike Co.* 5 Vt. R. 580; 1 Swift's Dig. 552.

If, therefore, the treetops in question had been cut out, so as to leave room sufficient between them for loaded teams to pass each other without difficulty, the defendants were not in fault, and the road was reasonably safe for travellers, and the jury should have been so instructed.

2. Towns are not liable for "special damages" happening upon their roads and bridges, when they are kept in such a

state of repair as to enable persons, in the exercise of common and ordinary prudence, to travel upon and over them with their teams and carriages in safety. 6 Pick. R. 189. The plaintiff's horse was not injured by the tree tops, nor did the running horse take fright at them and break away from his driver. The loss was the result of accident, and that alone. Suppose the frightened horse had been killed by running onto the plaintiff's horse, would the town have been liable for damages? I apprehend not. If the plaintiff had alleged and proved that the running horse broke from his driver in consequence of the insufficiency of the road, and run onto his horse and killed him, he would have made a case of less doubt than the one we have under consideration.

3. The only defect in the road complained of in the declaration, was the position of the tree tops. Now if the plaintiff had passed the tree top some twenty feet or more when the injury happened, and there was a free and unobstructed passage on both sides of his team sufficient for him to have turned out of the travelled path of the road, or for the frightened horse to have passed by him, the verdict most certainly should have been for the defendants, and the jury should have been so charged.

The frightened horse could not have been crowded by the tree top on the east side of the road onto the plaintiff's horse, if the plaintiff had passed it twenty feet or more when the injury happened.

4. If the plaintiff, when he discovered the frightened horse running furiously towards him, stopped his horse in the middle of the travelled path of the road, and made no effort to turn out, when there was no obstruction to prevent it, he took the risk of injury upon himself, and the defendants are not liable, and the jury should have been so instructed. If the running horse was not frightened and put in motion by the insufficiency of the road, how can the plaintiff recover for damages occasioned by his running? In no way, we apprehend.

Barlett, ***Fletcher***, and ***Skinner***, argued for the plaintiff, and, in support of the charge against the several objections urged by the defendant's counsel, cited Hawkin's P. C. 76, 147; 10 Petersd. 236; *Noyes* v. *Morristown*, 1 Vt. R. 353;

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Richardson v. *Royalton & Woodstock T. Co.* 5 Vt. R. 580; *Lester* v. *Pittsford*, 7 Vt. R. 158; *Hunt & wife* v. *Pownal* 9 Vt. R. 411; *Noyes* v. *White River T. Co.* 11 Vt. R. 531.

The opinion of the court was delivered by

ROYCE, J. — The evidence on the part of the defendants tended to show, that the tree tops had been cut away from the central part of the road, so that loaded teams could, and did, pass each other, between those tops, without inconvenience; that the plaintiff had passed the tree tops a distance of at least twenty feet when the injury happened; and that his team was then standing still in the travelled path, with sufficient room on either side for another team to have passed him in safety. Was it the duty of the court to instruct the jury, that upon proof of these facts the defendants were entitled to a verdict? It has long been the practical and received doctrine in actions of this sort, that whether the road was out of repair under circumstances to place the town in fault, — whether the injury happened from that cause, — and whether the party injured conducted with due care and skill, — are questions of fact, or mixed questions of law and fact, to be determined by the jury under proper instructions from the court. The evidence may, indeed, disclose facts of so decisive a character, as to justify the court in directing a verdict upon the mere finding of those facts. But in ordinary cases, (I mean those which admit of doubt as to the just liability of the town) such a variety of facts and circumstances will usually require to be weighed, that the jury must be left, upon due consideration of the whole matter, to draw the ultimate conclusion.

Assuming, then, that there was a clear space between the tree tops, of sufficient width for teams to pass each other, yet the size and position of those tops might be such as to give the passage a more contracted appearance, especially, if seen even from a short distance, or in a diagonal or transverse direction. The verdict has established the fact that they caused the frightened horse to crowd in upon the plaintiff's team. It is contended, however, that the road was not out of repair, within the purview of the statute, and that the plaintiff's loss should be referred to that class of casualties for which there is no remedy. The statute prescribes no

definite standard of sufficiency in the construction of a road, nor what shall constitute a proper state of repair. It is obvious that this could not be done. The standard should vary as applied to different roads, and even to the same road at different periods of time. I am aware of no rule on the subject, which indicates with greater accuracy the just obligations of a town, than that contained in the second paragraph of the charge. The object to be secured is the reasonable safety of travellers, considering the amount and kind of travel which may fairly be expected on the particular road. There are cases in which the court will take it upon themselves to judge, whether this object has been sufficiently attained; as was done in the case of *Halley* v. *Winooski Turnpike Co.* 1 Aik. 74. But in general the inquiry is such as to fall more properly within the province of the jury. And we are satisfied that this case was not entitled to be treated as an exception.

It being thus settled by the jury, in the exercise of their appropriate powers, and under proper instructions from the court, that the state of the tree tops constituted a want of repair in the road, for which the town was justly chargeable with neglect, and that the injury complained of was occasioned by such want of repair, it follows that the distance from the tree tops, at which the injury happened, becomes of no importance. Its only tendency was to render a fact improbable, which the jury have, nevertheless, found.

In regard to the fact that the plaintiff's team was standing still in the travelled path when the injury happened, it is sufficient to remark, that the want of ordinary care and prudence on the part of the plaintiff is conclusively negatived by the verdict.

Enough has been said to show that the plaintiff is legally entitled to retain his judgment. But a proposition implied in the defendant's second request should receive some further consideration. The proposition is,—"that towns are not liable for damages happening upon their roads and bridges, when they are kept in such a state of repair as to enable persons, in the exercise of common and ordinary prudence, to travel upon and over them with their teams and carriages in safety." This would seem to exclude all liability resulting from accidents on the road. But no such universal exemption, on the ground of accident, has ever been recog-

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nized in this state. On the contrary, it has long been considered, and repeatedly adjudged, that a duty does exist, which binds the town or corporation to provide reasonable security in reference to such accidents as may be expected to happen. 1 Aik. 74, above cited; *Hunt & wife* v. *Peacnal*, 9 Vt. R. 411. In some cases this obligation is strong and manifest, as in that of a high bridge, a dangerous precipice, and the like; whilst in others it is less urgent and scarcely perceptible. The term *accident* may be employed in these cases to signify the primary or the proximate cause of the injury. And to entitle a party to claim redress in such a case, the accident, be it of either description, must not appear to have been occasioned by any fault of his; whilst on the other hand, it will be sufficient to show, that the accident in either sense is justly imputable to some fault of the town. Again, it is not required that the fault of either party should alone have occasioned the accident, or produced the injury. If the plaintiff's fault has but contributed with other means, it will defeat his remedy; and if he is without fault the town may be subjected, though the want of repair may have only co-operated with other causes in effecting the injurious result. 9 Vt. R. 411, before cited.

Upon the whole, though we may doubt as to some of the conclusions of fact which were drawn in this case, we discover no valid objection to the charge of the judge. And the consequence is, that the judgment of the county court must be affirmed.

NOVATUS BLODGET *v.* JOHN R. SKINNER.

If the plaintiff, in an action commenced before a justice of the peace, and appealed to the county court, files a new declaration in the county court, for a different *cause of action*, and the defendant, without objection to its being received, takes issue under it, either upon matter of law or matter of fact, it will be considered as a waiver of the variance between the old and the new declaration.

The variance should be taken advantage of by a motion to dismiss the new declaration.

When one makes use of the name of another in a suit, to enforce a collection for his own benefit, he is under a *moral obligation* to indemnify him whose name he uses, from any cost or trouble arising from the suit; and such obligation is a sufficient consideration for a promise.

THIS was an action of assumpsit, brought by appeal, to

the county court. In the original writ the plaintiff declared that the defendant, being indebted to him for divers wares and merchandize, in consideration thereof, undertook and promised to collect for the plaintiff, a certain promissory note for $25, "in which case Novatus Blodget was plaintiff and 'James Bell defendant, and pay over to the plaintiff the 'aforesaid sum of money as should be thereto afterwards 'requested;" which he averred had not been paid to the plaintiff, by reason whereof he had been put to cost and trouble to the amount of fifty dollars.

Upon the entering of the appeal in the county court, the plaintiff filed his declaration against the defendant, in a plea of the case; in which declaration he alleged, in substance, that the defendant had been in possession of a certain promissory note payable by James Bell to Pliny Bliss or bearer, and for the purpose of collecting the same, commenced a suit thereon, in the plaintiff's name, against said Bell, and recovered a judgment thereon before a justice of the peace, from which judgment said Bell appealed, and, finally, by the consideration of the county court, recovered a judgment against the plaintiff, for a large amount of cost, on which judgment he took out execution. And the plaintiff averred that he never had any interest in said note, but that the defendant conducted and managed said suit for his own benefit; and that, on the day on which said Bell took out said execution against the plaintiff, in consideration of the premises, the defendant promised to save harmless the plaintiff from all liability on said execution — which the plaintiff averred he had not done, but that the plaintiff had been compelled to pay said execution.

To this declaration the defendant demurred, and for causes of demurrer set forth: 1. The variance between the declaration, and the one upon which the trial was had before the magistrate. 2. That the promise alleged was founded only on an executed consideration, and it was not alleged that the defendant requested the plaintiff to be permitted to use his name in said suit against Bell. There was a joinder in demurrer.

The court rendered judgment that the declaration was sufficient; to which decision the defendant excepted.

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W. K. Upham, for defendant.

The defendant insists that the declaration is insufficient for two reasons. 1. Because the declaration upon which the trial was had before the justice, was not for the same cause of action set forth in this declaration; and this can be taken advantage of upon demurrer. 2. It is insufficient in substance for the following reasons: It is not alleged therein, that the defendant requested of the plaintiff to be permitted to use his, the plaintiff's name, in the suit against Bell; therefore, there was no consideration for the defendant's alleged promise. The consideration was wholly "*past and executed.*" There is no allegation or averment in the count that defendant commenced the suit in the name of the plaintiff against Bell without his, the plaintiff's, knowledge or consent or permission; therefore the "*moral*" and "*legal obligation*" do not attach and combine to render the promise legal and binding; and the allegation or averment in the declaration, "that plaintiff never had any interest in the note, and that defendant controlled, managed and carried on said suit, for his own benefit, is not equivalent to such allegation or averment. 1 Saund. 264, n. 1; 2 Stra. 733; Dyer, 272; 1 Chit. Pl. 323–4, n. 1, and cases there cited; 5 Vt. 28; 8 Vt. 501.

B. N. Davis, for plaintiffs.

1. The first objection to the plaintiff's declaration is no ground of demurrer. A variance, as pointed out, could be taken advantage of only by motion to dismiss the new declaration, or by objecting to receive it.

II. The promise is not founded on a *past* and executed consideration, but is founded in a moral and equitable obligation to pay the execution.

The defendant commenced a suit for his own benefit, in plaintiff's name, the plaintiff having no interest whatever in it, never having given permission to defendant to use his name. The result was an execution for costs against the plaintiff, which he had to pay. If the defendant was not under a *moral* and *equitable* obligation to pay the execution, it is difficult to understand what would create such obligation. In *Hawks* v. *Saunders*, Cowp. R. 287, Lord Mansfield says, that "where a man is under a legal or equitable obligation to

pay, the same implies a promise though none was actually made. *A fortiori*, a legal or equitable duty, is a sufficient consideration for an actual promise." He further observes "where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." See, also, *Watson* v. *Turner*, Bull. N. P. 129; 1 Sw. Dig. 204; 2 East, 505; 1 Vt. R. 420; 4 do. 144; 5 do. 172.

The opinion of the court was delivered by

HEBARD, J.—The first cause of demurrer, assigned by the defendant is, that the declaration sets up and counts upon a different cause of action, from the one in the original writ.

The right to file a new declaration is regulated by a rule of court; and when the declaration, so filed, is, in itself, good, and sets forth a good cause of action, if it is inconsistent with the original cause of action, objection, in proper time, should be made to receiving it, or it should be met by a motion to dismiss; and if no such motion or objection is made, the question of variance will be understood as being waived, like an informal plea.

Another cause of demurrer, set down by defendant, is, that "the promise alleged in the declaration is founded only upon an executed consideration, and that it is not alleged therein that the defendant requested the plaintiff to be permitted to use his name in said suit." The objection is also taken in argument, that the action should have been *case* and not *assumpsit*. But in relation to this, there is no occasion to inquire. We are trying the legal points in the declaration, and have no opportunity of knowing whether the proof would have sustained the allegations. If it is true, as alleged, that the defendant, without leave, and without right, made use of plaintiff's name in said suit, by which he became subjected to the payment of a bill of cost, there could be no doubt, that the defendant would be under a *moral*, if not a *legal* obligation to indemnify him; and either is a sufficient consideration for a promise. The declaration alleges that, in consideration of the premises, the defendant promised to pay and save harmless the plaintiff from all harm and liability on said execution. There is a direct and sufficient promise alleged, founded upon a good and sufficient consideration.

Judgment of county court affirmed.

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Sutton v. Burke.

Town of SUTTON *v.* Town of BURKE.

A person, under the act of 1817, does not gain a legal settlement by residing in a town seven years, unless such person had, previously, a legal settlement in some other town in this state.

THIS was an appeal from an order of removal of one Rebecca Davis, from Sutton to Burke. Trial by jury. The town of Sutton gave evidence tending to show, that, in 1821, the pauper removed from the state of New Hampshire into Sutton, and there resided until 1824, when she moved into the town of Burke, and there resided ten years, supporting herself and not becoming chargeable; that she then moved into Waterford, and resided there five years, and from Waterford to Sutton, where she resided until she was removed under the order in question. The town of Sutton insisted, and requested the court to charge the jury, that if they found that the pauper resided in Burke seven years continuously, supporting herself, during that period, they should return a verdict that she was duly removed. But the court instructed the jury that, unless they found the pauper had a settlement in some town in this state, prior to her going to reside in Burke, a residence of seven years in the latter town would not give her a settlement there; to which instruction, after a verdict that the pauper was unduly removed, the town of Sutton excepted.

J. R. Skinner & W. Upham, for plaintiffs.

It is claimed by the defendants that the pauper acquired no legal settement in the town of Burke, under the act of 1817, for the reason, that the pauper had no legal settlement in the state, previous to her residence in Burke.

The object of the legislature was to provide for the gaining of settlements in future; and the act was intended to apply to all that had, and should in future, become citizens of this state. It is not to be presumed that the legislature intended to repeal all former modes of gaining a legal settlement, after persons should come into the state, and not make provision for those that had not gained a legal settlement in the state and yet were located for life.

If the construction contended for be correct, no person, coming into the state to reside, could, by any possibility,

gain a legal settlement in any town in the state. The statute should be construed according to its spirit and meaning.

By the proviso, no persons could gain a legal settlement by mere residence, unless their names were registered in a book in the clerk's office in the town where they intended to gain a settlement. But that proviso was repealed in 1821, and furnishes a clue to the intention of the legislature. The term settlement, in the commencement of the 8th section, means nothing more than mere residence. *Burlington* v. *Calais*, 1 Vt. R. 385.

Geo. C. Cahoon for defendant.

The law in this case, is "Any person *having a settlement, in any town in this state*, and of full age, who shall hereafter reside in any other town in this state for the term of seven years, and during said term maintain himself or herself and family and not become chargeable to either of said towns, shall be adjudged to gain a settlement in the town in which he or she may so reside." 8th sec. act of 1817, Slade's Comp. Stat. 382. The language is plain and explicit, and the charge and the law coincide. The court below are fully sustained by the statute, and its judgment should be affirmed.

The opinion of the court was delivered by

HEBARD, J.—This pauper in 1821, removed from the state of New Hampshire into the town of Sutton, and resided there till 1824, when she removed to the town of Burke, and resided there ten years, supporting herself. She then moved into Waterford, and resided there five years, and then moved to Sutton, where she resided until removed to Burke, under the order in question.

The language of the statute is, that "any person having a settlement in any town in this state, and of full age, who shall hereafter reside in any other town in this state, for the term of seven years, and during said term, maintain himself, or herself, and family, and not become chargeable to either of said towns, shall be adjudged to gain a settlement in the town in which he or she may so reside."

There was no provision of the statute by which said pauper had gained a legal settlement in this state, at the time she went to reside in the town of Burke, in 1824; and

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the question here arises, whether she could gain a legal settlement in Burke, by residing there *seven years*, she having previously no legal settlement in the state.

The expression of the statute is very explicit, and does not seem to admit of any doubt. The terms *settlement* and *legal settlement*, are used indiscriminately in this state, and are well understood to have a fixed and technical meaning. The difference between the term *settlement*, and *residence*, is palpable in the section of the statute quoted. This section merely points out the mode of changing a *settlement* from one town to another. Of course, the person must first have a *settlement*, before he can change it. A person may change his *residence* at pleasure, and as often as he chooses; but this imposes no liability upon the town in which he resides, unless his *residence* contains the statutory requisite for a legal *settlement*, except the general one, which is, that towns are liable to support such poor persons, as reside in such town, having no legal settlement in the state. All the statutes on this subject keep up a studied and marked distinction between the phraseology of *coming to reside*, and *having a settlement*.

As all the liabilities of towns to support their poor are matter of strict law, we are bound to give the law a strict construction; and, by so doing, in this case, it will be found, that the pauper's residence in Burke, of more than seven years, wanted one essential requisite to give her a settlement in that town; and that was, a previous settlement in some other town in this state. But it is understood that this question has before been settled by this court, in Windham county, and is, therefore, not an open question.

The judgment of the county court is affirmed.

STATE OF VERMONT *v.* ORAMEL H. FREEMAN.

Where it becomes necessary, in charging the commission of an offence, to allege that a certain term of a county court was duly holden, it is not sufficient to allege that it was holden by and before the chief judge of such court, without mention of any assistant judge. If either of the judges is named, it should appear that, at least, a quorum of the court held the term.

So if it be alleged that a particular cause was tried, by and before the chief judge, it should appear that one or both of the other judges assisted to try it, or that they were unable or disqualified to sit on the trial.

THIS was an indictment for a misdemeanor, charging that the respondent, being a deputy sheriff in attendance upon the Caledonia county court, at its June term, A. D. 1841, and as such officer of said court, having the private charge of a jury, who had retired to agree upon their verdict in a certain cause, conversed with said jury touching the merits of said cause, and attempted to influence their verdict in the same, in violation of his official oath and duty.

The indictment, after the caption, commenced as follows: "The grand jurors within and for the body of the county of 'Caledonia aforesaid, now here in court duly empannelled 'and sworn, upon their oath present, — that heretofore, to 'wit, at the county court begun and holden at Danville, with-'in and for the county of Caledonia, on the first Tuesday of 'June, in the year of our Lord one thousand eight hundred 'and forty one, *by and before* the Hon. Isaac F. Redfield, 'chief judge, there came on for trial a certain action 'then pending in said court." &c. The county court having adjudged the indictment sufficient on demurrer, the respondent brought the case into this court upon exceptions to that decision.

Upham and *Stoddard*, for the respondent.

The indictment is defective, because it is therein alleged that the action in favor of *Parks & Co.* v. *Richardson*, was tried before the county court *begun* and *holden* at Danville, &c., *by and before the Hon. Isaac F. Redfield, chief judge.* The chief judge, we say, had no authority to *open* and *hold* the court; consequently, all proceedings before him were *coram non judice.*

The statute provides there shall be, in each county, a

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county court, to consist of one chief judge and two assistant judges, to be appointed for each county, any two of whom shall be a quorum. Stat. ch. 25, p. 159, § 3. Sec. 28 provides for the trial of a cause by one judge, when the other judges *present* are legally disqualified to act on the trial of such cause. But no provision is made for one judge, in the absence of the other two, to open the court or try a cause.

The defendant is charged in the indictment with an attempt to "impede and corrupt the administration and due course of justice." Now, if chief justice Redfield had no right to begin and hold the court, there was no administration of justice for the defendant to *impede*, *prevent*, or *corrupt*.

No precedent can be produced in support of this indictment. If chief justice Redfield had power, under any circumstances, to begin and hold a county court, the case might be different, but he has none.

What answer then can be given to this objection? The allegation, that the court was *begun and holden by and before the Hon. Isaac F. Redfield*, is clear and unequivocal, and cannot be denied. Can it be rejected as surplusage? We think not; for it is a necessary ingredient in the offence.

Again, it is a general rule, that an allegation in pleadings, which is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, cannot be rejected as surplusage, though laid with a *vide licet*, however inconsistent it may be with an allegation subsequent. *Rex* v. *Stevens*, 5 East, 244; Arch. Pl. & Ev. 112, 113; Arch. Crim. Pl. 56.

The rule that allegations, not essential to constitute the offence, may be rejected as surplusage, does not extend to allegations, necessary or unnecessary, which are descriptive of the identity of that which is legally essential to the charge. Arch. Crim. Pl. 107, 108.

C. P. Howard, State's attorney.

We find no form given either in the common law, or by statute, for this offence. The only form found that bears any resemblance or analogy to this, is the indictment for perjury and, perhaps, subornation of perjury, in which cases it is necessary to describe, and set forth in the indictment, the court or authority, before whom the perjury was committed.

It is contended by the government that this indictment is drawn in conformity to several precedents found in the books. True, all those precedents are indictments for perjury, but why should the prosecuting attorney be required to use greater care, or more strictness and certainty in drawing an indictment for a misdemeanor than for perjury? 2 Chit. C. L. 186, 189, 192, 231, 249, 251. "An indictment for perjury at the assizes may however, allege the oath to have been taken before one of the judges in the commission, though the names of both are inserted in the exception." 1 Chit. C. L. 243–4; 14 East. 218; n. *a*; 1 Leach, 179, 150; 5 T. R. 311; 1 Leach, 192.

We think the foregoing precedents and authorities, together with the fact, that it is literally true that the cause was tried before the Hon. Isaac F. Redfield, are sufficient to support this indictment, in the absence of any form or precedent given for the offence for which respondent is indicted.

Should the court, however, consider that the authorities and the arguments adduced do not warrant the conclusion to which we have arrived, we contend, that the objectionable part of the indictment should be struck out, as surplusage; and that the description of the court, before which the action came on for trial, is perfect, and set forth with legal certainty, after striking out the objectionable part; and the prosecuting officer would have omitted that part, had he not undertaken to follow some of the above precedents.

The distinction between material and immaterial averments is perfectly well settled in criminal as well as civil cases; and if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be wholly superfluous it may be thrown out of the question. 1 Chit. C. L. 453.

"It is a general rule, that whenever an averment may be *wholly* rejected without prejudice to the charge or action, proof is unnecessary." 3 Stark. Ev. 1533; 2 East, 452; Mann. Dig. 381; 2 Church Dig. 725; 4 Pick. 252.

The opinion of the court was delivered by

ROYCE, J. — The first question is, whether the name of the judge, where it occurs in the commencement of the count, refers to the holding of the county court for the June term, A. D. 1841, or to the trial of the action there mentioned. The

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more obvious application is to the holding of the court. This construction is according to the usual rules of composition and punctuation, whilst it corresponds with the English forms in cases having the nearest resemblance to the present. Indictments for perjury, committed in trials at *nisi prius*, as given in those forms, uniformly introduced the name of the judge by whom the court was holden. The expressions here used *may*, doubtless, be taken to refer to the trial of the action. But this becomes a less plausible and consistent reading when it is considered, that in our practice such a reference to the particular judge, or judges, by whom a cause was tried in the county or supreme court, is not only quite unusual, and perhaps unprecedented, but altogether useless. A trial in either of these courts proceeds under the collective authority of the court. And if it so happens that one judge may legally try a particular cause, he possesses, *pro hac vice*, the judicial power of the entire court, and, indeed, becomes the court. There is, therefore, no more occasion for naming the single judge in that instance, than for naming all the judges in common cases. The trial is as much by the court in one case as the other.

But the English forms of indictments for perjury will be found to differ in this respect, as they relate to a trial at *nisi prius*, or to a trial at bar. In the former case the name of the judge is mentioned, whilst in the latter none of the judges, composing the court or acting in the trial, are named. There is a reason for this difference, arising from the difference of authority under which the judges act in the two cases. In the former, the authority is by special assignment for the particular term or circuit; in the latter, it is a permanent authority derived immediately from the law. Hence, in order to show that there was a legal session for holding pleas in the one case, the name of the judge and his appointment to that service should be alleged; but in the other, no special appointment being necessary, neither the names of the judges, nor their authority to act as such, need be averred. The authority in one case emanates from the special appointment; in the other it is inherent in the court as a permanent tribunal. And such is the case here. It appears, therefore, that if the present indictment is understood, in this particular, as being descriptive of the authority by which the term

was holden, it receives no support from precedent. Neither can it derive any from our statute, which expressly requires at least two of the judges, to constitute a legal county court for the transaction of business.

Upon the other construction the indictment would appear to be no less defective. One judge of the county court has no general authority to try a cause. He can only do so when the other judges present (and there must be one such at least) "are legally disqualified to act on the trial of such cause." R. S. ch. 25, § 28. Consequently, in order to show such a trial to have been competent and legal, it should be alleged that the other judges were disqualified to act in it.

But it is urged that the name of the judge may be striken from the indictment as surplusage. The distinction is between averments which are material and pertinent, and those which are wholly immaterial or not pertinent. Now it would doubtless have been sufficient in this instance to say that the term was duly holden, without naming any of the judges. But since it could not be holden to any effective purpose without judges, the name of the judge alleged to have held it, becomes descriptive of the court, and the holding of the term. The name is thus rendered material and cannot be rejected.

The result is, that upon no ground can the indictments be sustained without the aid of those intendments which are never extended to the support of a criminal accusation.

Judgment that the indictment is insufficient.

CARLETON H. HILL *v.* JOSIAH BELLOWS.

When a debtor, against whom there is cause of action, is out of the state at the time the cause of action accrues, the statute of limitations will not run on the demand, unless he returns into the state, and that fact is known to the creditor.

If a debtor, absent from the state, would avail himself of the statute of limitations on the ground of his having, in the state, property subject to attachment, it is incumbent on him to show this fact; and it is not sufficient to show that he has deeds of land on record, without showing a title in himself.

The certificate of a town clerk, that a person has not conveyed land, is not evidence of that fact, but it must be proved by the oath of a witness or witnesses.

THIS was an action of book account, originally brought before a justice of the peace and appealed to the county

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court, January term, 1842, where judgment to account was rendered, and the case referred to an auditor who made his report substantially as follows: —

That on the 9th day of May 1842, the parties appeared before him and were heard with their allegations and proofs. The defendant plead in bar the statute of limitations — the whole of said account having accrued more than six years previous to the plaintiff's action. The plaintiff objected to said plea on the ground that it was too late to plead the statute of limitations after judgment to account, which objection was overruled by said auditor. The plaintiff then replied over to the defendant's plea in bar, that the defendant, since the plaintiff's cause of action accrued, has ever resided without this state, neither had he known property within this state, which could be attached by the ordinary process of law. Traversed by the defendant. The plaintiff proved that the defendant had resided out of the state ever since the plaintiff's cause of action accrued.

The defendant proved that he had been casually in this state, and also offered in evidence a record copy of a deed from Miles Coe, collector of a land tax in Easthaven, to the defendant, dated February 9, 1831, acknowledged and recorded, conveying to said defendant certain lands in Easthaven, and also a certificate of the county clerk of Essex county, that there was no conveyance of said lands from said defendant on record in his office. The defendant also offered in evidence an office copy of a deed from Erastus Cutler, collector of a land tax in Guildhall, to the defendant, dated October 6, 1830, acknowledged and recorded, purporting to convey to defendant certain lands in Guildhall, and also the deposition of John Dodge, town clerk of said Guildhall, that there was no conveyance of said land from the defendant. The defendant also offered in evidence a deed from B. Quimby to himself, dated November, 1806, and recorded November, 13, 1806, purporting to convey to defendant certain lands in Lunenburgh; also a deed from Samuel King to Bellows & Stone, dated January 6, 1804, recorded January 7, 1804, purporting to convey lands in Lunenburgh; also a deed from J. Sessions to Bellows & Stone, dated September 27, 1804, and recorded October 13, 1804, purporting to convey lands in Lunenburgh. The defendant also offered in evidence a

certificate of the town clerk of Lunenburgh that there was no conveyance of these lands on record from said Bellows, which was objected to by the plaintiff and rejected by the auditor.

The plaintiff then proved that, in the year 1837, the defendant received a deed from Thomas Carlisle, of Lancaster, N. H. of a quantity of land in this state, including most of the lands embraced in the above described deeds, under a verbal agreement that he should hold it in trust for the creditors of Carlisle, and that it was generally supposed that Bellows owned no real estate in this state, except in trust as aforesaid.

The auditor decided that the deeds, offered in evidence by the defendant, unaccompanied by evidence of title in the grantors, and without evidence in support of the vendue sales of the collectors, are not sufficient evidence to establish the fact that the defendant had known property in this state.

The defendant proved that, during the last six years, he had been repeatedly in this state, and occasionally with personal property, but did not offer to prove that this was at any time known to the plaintiff; whereupon the auditor decided that the plaintiff's action was not barred by the statute of limitations. It also appeared in evidence that, after the commencement of the present action, the defendant acknowledged there was an unsettled account between him and the plaintiff, of long standing, and that they had never settled.

The auditor then proceeded to examine the accounts of the parties, and allowed the plaintiff items of his account amounting in the whole, deducting the items disallowed, to $58.79. The auditor allowed the defendant's account, which, together with the items of credit on plaintiff's account, amounted to $50.66; leaving a balance due to the plaintiff of $8.15, to which the auditor added interest from Jan. 6, 1833, and found due to the plaintiff the sum of $12.68, to balance book accounts between him and the defendant.

On the trial of this case before the auditor, it appeared that the plaintiff resided in Guildhall about two years after the cause of action accrued, and in Danville, since, more than six years next preceding the commencement of this action; that the admission, made by the defendant, that there was an unsettled account between him and plaintiff, was made during the trial before the auditor; and that, on said trial,

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the defendant insisted that there was a balance due him from the plaintiff.

The defendant excepted to the report for the causes following:

1. The auditor erred, in law, in rejecting the certificate of the town clerk of Lunenburgh, as to the state of the town records. 2. The auditor erred in deciding that the conveyance to the defendant from Thomas Carlisle, with a verbal agreement that the lands conveyed should be held in trust for the payment of certain debts, deprived them of the quality of attachability, in behalf of creditors without notice of the trust. 3. The auditor erred in admitting evidence of what was generally *supposed* as to defendant's owning lands in this state. 4. The auditor erred in deciding that the deed from Carlisle, with a verbal declaration of trust, because it included *most* of the lands described in the several deeds and copies of deeds shown by the defendant, should have the same effect as if it had included all of them. 5. The auditor erred in deciding that the several deeds of lands in Lunenburgh were insufficient to show that defendant had known property in this state, which might have been attached, unless accompanied by evidence of title in the grantors. 6. The auditor erred in deciding that collectors' deeds of lands were insufficient for the same purpose, unless accompanied by evidence of the regularity of the vendue sales. 7. The auditor erred in deciding that frequent and repeated visits of defendant to this state, and sometimes with personal property, unless it were actually proved that plaintiff knew of such visits, would have the effect of suspending the statute of limitations. 8. The auditor erred in deciding that the acknowledgement of defendant, made after the commencement of this suit, that there was an unsettled account between him and plaintiff of long standing, and that they never had settled, was equivalent to a new promise to pay any balance, or any portion of plaintiff's account, when no dealings had occurred between them within the last six years.

The county court overruled the exceptions, and rendered judgment on the report, for plaintiff; to which the defendant excepted.

C. Davis, for defendant.

1. The auditor erred in excluding the certificate of the

town clerk of Lunenburgh, that there was no conveyance on record, from the defendant, of the lands deeded to him by Quimby and others. The certificate of a public officer, having by law custody of records, is evidence not only of what *is*, but of what is *not* found on record. 1 Stark. Ev. 173. Perhaps the fact asserted in the certificate will be presumed. Greenl. Ev. 46–7.

2. The auditor erred in his construction of sect. 10, old Rev. Laws, 291, under which he decided that the deeds from Quimby and others to defendant did not, without further evidence of good title in the several grantors, show that the defendant possessed *known property in this state, which could, by the common and ordinary process of law, be attached.* The record of the deeds was *constructive* notice to all the world of defendant's ownership. It is immaterial whether the fact of ownership was known to the plaintiff or not. *Tucker* v. *Wells*, 12 Vt. R. 240. The case of *Mazozon* v. *Foot*, 1 Aik. R. 282, bears a strong analogy to the present.

3. The evidence of title was, at least, *prima facie*, sufficient to enable the defendant to have recovered in an action of ejectment; and much more ought it to be sufficient here, where the question is not so much whether the plaintiff could obtain satisfaction for a judgment recovered, as whether he could obtain legal service of a writ. *Byron* v. *Crowninshield*, 1 Pick. R. 266; 15 do. 190.

4. It is well settled law in Massachusetts, New York, Maine, and in this state, that the simple admission of the existence of an old, unsettled account, made while a party still insists on the statute of limitations, and denies his indebtedness, cannot be construed into a waiver of the benefit of the statute, or a revival of the promise to pay. There is no modern decision to favor such a notion. *Phelps* v. *Stewart & Wood*, 12 Vt. R. 256; *Blake & Hart* v. *Parleman*, 13 Vt. R. 574; *Bangs* v. *Hall*, 2 Pick. 368; 5 Binney, 380; *Read* v. *Wilkinson*, 2 Brown's R. (app.) 16; *Whiting* v. *Bigelow*, 4 Pick. R. 110; *Bailey* v. *Crane*, 21 Pick. R. 323; *Danforth* v. *Culver*, 11 Johns. R. 146; *Sands* v. *Gelston*, 15 Johns. R. 511, *Cambrage* v. *Hobart*, 10 Pick. R. 232; *Sigourney* v. *Drury*, 14 Pick. R. 390; *Parley* v. *Little*, 3 Greenl. R; *Deshors* v. *Eaton*, 4 Greenl. 413; *Hancock* v.

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Bliss, 7 Wend. 267; *Welyett* v. *Bussan*, 11 Wheat. 309; *Bell* v. *Morrison*, Pet. S. C. R. 351; *Barnard* v. *Bartholomew*, 22 Pick. R. 291.

T. Howard, for plaintiff.

We contend that a vendue deed of land in Easthaven, Guildhall or Lunenburgh, or, in fact, any deed of land, unaccompanied with other proof of title, does not show the defendant possessed of such *known* property, as plaintiff is bound to take notice of, and attach, to avoid the statute of limitations, neither will any title to land, in any town in this state, when more than ordinary diligence is required to learn the fact, be considered known property within the meaning of the statute.

Plaintiff was under no obligation to attach property of a doubtful title or ownership, in order to keep his demand alive. The object of the plaintiff, when he sues his demand should *always* be to obtain pay, part pay, or security, and he should not be encouraged, much less compelled, to sue for any other purpose. 5 Mass. 362; 6 Pick. 364, 243–4. If the court should differ from these views we remark,

Plaintiff relies upon a new promise. The auditor finds that the defendant acknowledged, after the commencement of this action, that there was an unsettled account between him and plaintiff, of long standing, and that they had never settled, and defendant insisted that there was a balance due him from plaintiff. It has been held that the slightest acknowledgment will take the case out of the statute of limitations; as where the defendant said, "I am ready to account but nothing is due to you." 2 T. R. 760; 1 Esp. 437; 3 do. 157; 4 East, 598; 2 Cowp. 548; 3 Mass. 271; 7 do. 517. An admission of mutual unliquidated accounts, on which each party claims a balance, takes the case out of the statute. 2 Cond. U. S. R. 177; 3 Mason, 457.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The only questions in this case arise on the decision of the auditor in relation to the statute of limitations.

The 14th section of the statute for the limitation of actions provides, that "if, at the time when the cause of action

of a personal nature shall accrue against any person, he shall be out of the state, the action may be commenced within the time limited therefor, after such person shall come into the state." There is another clause in this section, which provides, that if, "after any cause of action shall have accrued, and before the statute has run, the person against whom it has accrued shall be absent from, and reside out of, the state, and shall not have known property within this state, which could, by the common and ordinary process of law, be attached, the time of his absence shall not be taken as any part of the time limited for the commencement of the action." The statute in existence prior to the passing of the Revised Statutes, was somewhat similar in its provisions.

The auditor has found, that the defendant resided out of the state at the time the cause of action accrued; and though it was proved that the defendant had been within this state repeatedly within six years, with personal property, yet, it was not proved, nor was there any offer to prove, that this was, at any time, known to the plaintiff. The account, therefore, was not barred by the statute of limitations, according to the authority of the case of *Mazozon & Sperry* v. *Foot*, 1 Aik. 282.

The defendant, however, insisted that the statute should run, as he had known property within the state which could, by the ordinary process of law, be attached. It is questionable, whether this clause of the statute has any application whatever to the case under consideration, inasmuch as it is found that the defendant resided and was out of the state at the time the cause of action accrued. If it has any application, it was incumbent on the defendant, if he intended to avail himself of its provisions, to prove that he had known and visible property within the state from which the plaintiff could have satisfied his demand, by attachment and levy of an execution. It obviously falls very far short of proving this fact, to prove that he had deeds of land on record, without any further proof. The auditor correctly required him to prove title in his grantors, or, in respect to the vendue deeds, authority in the collector to sell and convey, as, without such proof, the evidence did not prove any property in the lands, described in the deeds, in the defendant.

The certificate of the town clerk, offered in evidence, was

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of no importance. If the defendant had known property in himself in any lands, it was not necessary or proper for him to show negatively that he had not conveyed the same away. Moreover if it had become necessary to prove that there was no conveyance from him on record, the legitimate proof of that fact would have been the oath of the town clerk or some one who had examined the records. The certificate of the town clerk is evidence of what is on record, but he is not a certifying officer as to what does not appear on record.

This view of the case renders it unnecessary for us to examine the question as to the admissions or acknowledgments of the defendant. From the view already taken, the statute had not run on the account of the plaintiff. The judgment of the county court is, therefore, affirmed.

WILLIAM MCGREGOR *v.* HARRIS BUGBEE.

B. N. and K. executed notes to McG. on the purchase of a saw-mill. Afterwards B. sold to N. his share, without making any contract that N. should indemnify him against the notes to McG. N. and K. afterwards sold the mill to G.; — *Held*, that B. could not defend against the notes he gave to McG. in consequence of any executory contract between McG. and N. to which B. was not a party.

A parol contract between McG., N. and G. might be varied or controlled by them before it was executed.

A receipt or writing is the best evidence of a contract, and is not to be controlled by any oral testimony relating to the contract, unless the contract evidenced by the writing or receipt is rescinded.

N. could lawfully dispose of the notes or property received on his sale to G. without applying the proceeds to the benefit of B.

ASSUMPSIT, on a joint and several promissory note, for one hundred dollars, signed by defendant and Myron S. Kimball and Ethan H. Nichols, payable to plaintiff in six years from date, with interest, dated March 12, 1834. Plea, general issue, and trial by jury.

On the trial in the county court, the defendant offered Myron S. Kimball, he being first duly released, as a witness, — the execution of the note being first admitted — who testified that the note sued, together with six other notes of one hundred dollars each, which notes were payable, the first in one year from date, and the others yearly after, in succession,

were executed by the defendant and said Myron S. Kimball and one Ethan H. Nichols to the plaintiff, and were all of like description, except as to the times when payable. The consideration of these notes was a saw-mill, at that time sold and deeded to defendant and Kimball and Nichols by the plaintiff; and the plaintiff received back at the time, a mortgage deed of the saw-mill, to secure the payment of the said notes. In February, 1836, Bugbee sold his interest in the mill to Nichols, and on the 5th of March, 1838, Kimball and Nichols sold the mill to one Lewis Gilman, for seven hundred dollars, and received one hundred and fifty dollars down, and Gilman's notes, secured by a mortgage of the mill, for five hundred and fifty dollars, which notes were made payable to Kimball and Nichols, with interest, annually, the first for one hundred dollars in one year from date, and the rest, with the exception of the last note, for one hundred dollars each, and the last for fifty dollars, payable yearly, in succession, there being six of said Gilman's notes. The sale to Gilman was under the following circumstances. At the time of the sale, and before it was consummated, the plaintiff, McGregor, was called in, Gilman, Nichols and Kimball being together, for the reason that Gilman was unwilling to make the purchase unless the old notes and mortgage between Kimball and Nichols and McGregor could be so arranged that they should be no incumbrance on the mill, and Kimball and Nichols were desirous to sell the mill and close up their other business, as they were about leaving the country; and McGregor and Kimball and Nichols, on that occasion, made and entered into the following contract, viz: that the Gilman notes should be received by McGregor in payment of the old notes, and McGregor was to wait until the new notes were due, and if they were paid he was to have no recourse to the old notes, but they were to be considered as paid and extinguished; McGregor holding both sets of notes and mortgages. Among the considerations of this contract was the fact that the last set of notes exceeded what was due on the first set, by a number of dollars, and the last set were on annual interest and the first payable with simple interest. The notes and mortgages were not then transferred to the plaintiff, nor was the contract in any manner closed except its terms settled, but the business

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was to be consummated very soon afterwards. On the 18th of April, 1838, Kimball took a receipt of that date from McGregor, which is as follows:

"Received of Myron S. Kimball two promissory notes, 'given for one hundred dollars each, the first payable in two 'years from date, the second payable in four years from date, 'and made payable to Ethan H. Nichols and M. S. Kimball, 'dated March 5th, 1838, both given on interest annually, 'signed by Lewis Gilman, to account for as follows, viz: 'Whereas I hold against said Kimball three promissory notes, 'all dated March 12, 1834, given for one hundred dollars 'each, on interest, and made payable to William McGregor, 'signed E. H. Nichols, Harris Bugbee, and M. S. Kimball, 'the first due March 12, 1838, the second due March 12, '1839, the third due March 12, 1840. As to the last de-'scribed notes, Miron S. Kimball is to pay me the one-half, 'amounting, principal and interest, to one hundred and 'eighty-six dollars, the 12th of March, 1838. Now I hereby 'agree that if said notes are paid by Gilman to me, I am to 'indorse the one-half of the last described notes satisfied; if 'not paid, then said K. is to pay me, and give up this re-'ceipt, by giving him up said Gilman's notes, on demand.

WILLIAM MCGREGOR.

"Attest, Ethan H. Nichols."

At that time it was talked over, and distinctly understood, and agreed, by McGregor and Kimball and Nichols, that the business should soon be consummated, in accordance with the foregoing contract, between McGregor and Nichols. The plaintiff then read in evidence a receipt executed by McGregor to Nichols, dated the 17th of September, 1838, of the following tenor:

"Received of E. H. Nichols four notes against Lewis Gil-'man, all dated March 5, 1838, and all with interest, an-'nually, one for the sum of fifty dollars, payable in six years 'from date, one for the sum of one hundred dollars, payable 'in five years from date, one for the sum of one hundred dol-'lars, payable in three years from date, and the other for the 'sum of one hundred dollars, payable in one year from date, 'with fifty dollars indorsed on the last described note, July '19, 1838, which I promise to account for on a note I hold 'against said Nichols of this date, for ninety-eight dollars

'and fifteen cents, and the balance on notes I hold against 'said E. H. Nichols, Harris Bugbee, and Myron S. Kimball, 'if said notes against said Gilman are paid; said notes 'against Gilman payable to said Nichols and Myron S. Kim- 'ball or their order. WM. MCGREGOR."

It appeared that all the Gilman notes and the mortgage were at that time in the hands of McGregor. It was then ruled by the court that the said receipts must govern the case, and that the foregoing parol evidence, in reference to the contract between the plaintiff and Kimball and Nichols, was inadmissible. The plaintiff then proved that Nichols held his receipt but a few minutes, or at most but an hour or two, and then gave it up to McGregor, and it was then agreed between them that McGregor should keep the Gilman notes receipted in the Nichols receipt, and should collect them, and apply the proceeds upon a liability of Nichols to McGregor upon certain covenants in a deed from the former to the latter. In this state of the case, defendant contended that the parol evidence excluded by the court should be admitted to go to the jury, but the same was excluded by the court. Besides the evidence before detailed, it was also proved, by the defendant, that McGregor knew of, and was present at, the sale made by Bugbee to Nichols of his interest in the mill; and that previously, and subsequently to the sale from Kimball and Nichols to Gilman and the contract between Kimball and Nichols and McGregor, Kimball notified defendant of what was doing and done, and consulted with him in relation to it. The defendant then proved that the three Gilman notes, which first became due, had been fully paid when they became due, and that the aforesaid three Gilman notes were all that were due; that no application or indorsement of the moneys, thus received by McGregor, had been made by him on the old notes, and none of them given up. Defendant further offered in evidence the repeated declarations and admissions of McGregor to Bugbee and others, since the execution of said receipts, and since the last agreement, aforesaid, between Nichols and McGregor, that he, McGregor, was bound to wait until the Gilman notes were due, and if they were paid he had no right to call on Bugbee, and no claims on him. For the purpose of showing a direct contract to that effect, between McGregor and said

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Bugbee, the defendant also offered to show that Nichols had no right to control the Gilman notes, or any part of them, except in accordance with the terms of the agreement first made with McGregor, by Kimball and Nichols. A verdict was then directed by the court for the plaintiff, for one-half of the note sued and the interest. The court informed the counsel that if the evidence last offered should go to the jury they should give in charge that it could not control the written contract between the parties, and so, also, of all that passed between the parties before and after the times of the execution of the receipts, unless they should be satisfied that, after the execution of the receipt, the parties rescinded that contract and made another contract such as defendant contended for; and that it was competent for the plaintiff and Nichols, in the manner specified, to apply those notes to other liabilities of Nichols to McGregor, it being admitted that the notes were in the possession and control of Nichols by the consent of Kimball and with the knowledge of Bugbee. Whereupon a verdict passed for the plaintiff to recover one-half of the amount of the note sued, and the defendant excepted to the decisions of the county court.

——— ———, for defendant.

1. The first question is whether the county court erred in rejecting the parol evidence offered by defendant. 1. We contend they did, and upon this part of the case cite the following authorities. 2 Stark. Ev. 544, 545, 554, 555, and note on last mentioned page; 12 Pick. R. 371; 1 Mason's R. 9; Chitty on Contracts, last edition, 108, 109; Greenl. on Evidence, 354, note 1. 2. We contend that this parol evidence should have been admitted, inasmuch as the bill of exceptions shows that "Nichols held his receipt but a few minutes or, at most, but an hour or two, and then gave it up to M'Gregor, and it was then agreed between them," &c. by parol.

2. The second question in the case is, whether the county court erred in taking the case from the jury and directing a verdict for the plaintiff, ruling out the evidence offered by the defendant in regard to the admissions of the plaintiff, &c. On this point the following cases are cited. 5 Vt. R. 107; 6 do. 191; 2 Aikens, 240.

3. The third question in the case is, whether the contem-

plated charge of the court was correct. On this head we cite the following authorities. 11 Vt. R. 367; 3 Kent's Com. 18; *Steinman et al.* v. *Magnus*, 11 East, 390; *Cockshott* v. *Bennet*, 2 Term R. 763; *Good* v. *Cheeseman*, 22 Com. L. R. 89; 19 Com. L. R. 94; 20 John. R. 78; 16 John. R. 86.

The court below say "it was competent for plaintiff and Nichols, in the manner specified, to apply those notes to other liabilities of Nichols." We contend there is error in this, inasmuch as there was a full execution of the original contract, made by all parties, when the notes in Nichols' hands were passed to M'Gregor. The agreement between Nichols and plaintiff was made in fraud of the previous contract, and was a fraud upon Gilman, Kimball and defendant. 11 Vt. R. 60.

4. We insist that the agreement, set up by defendant, and executed in the manner described in the bill of exceptions, is a sufficient defence to the action, by the way of accord and satisfaction, or accord and mutual promises, or conditional payment; and that a technical release was unnecessary. 2 Vt. 209; 3 Johns. Cas. 243; 1 Dig. N. Y. R. 9 and 10, and cases cited; Chitty on Contracts, last edition, 760 to 779; 5 Vt. R. 416; *Bryant* v. *Gale*, 2 Metcalf's R. 283; Chitty on Bills, last edition, 196; 8 John. R. 389; 15 Pick. R. 534; 18 Pick. 253, 414.

D. Hibbard, jr. & B. N. Davis, argued for the plaintiff, and, to the point that an agreement never to pursue Kimball upon the notes would constitute no defence for Bugbee, cited 5 Vt. R. 518; 8 T. R. 168; 1 Swift's Dig. 302; *Pinney* v. *Bugbee*, 13 Vt. R. 209; *Spencer* v. *Williams et al.* 2 Vt. R. 209.

To the point that the parol testimony, offered by the defendant, was properly excluded by the county court, as its tendency was to contradict the written receipts, they cited *Bradley* v. *Bentley*, 8 Vt. R. 243; *Reed* v. *Wood*, 9 do. 285; *Isaacs* v. *Elkins*, 11 do. 679; *Ripley* v. *Page*, 12 do. 353.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This action is brought to recover the amount of one of six promissory notes, executed by the de-

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fendant, Ethan H. Nichols, and Myron S. Kimball, to the plaintiff, on the 12th of March, 1834. Two of the notes were heretofore sued in the name of Pinney as indorsee of M'Gregor, in the county of Orleans, and a decision was had in that suit, which is reported in 13 Vt. R. 623. The defence is not presented, in this case, in as favorable a point of view as it was in that. Indeed, one strong, prominent fact, which appeared in that case, was not proved in this, viz: the insolvency of Nichols, and his agreement to indemnify the defendant from the note now in controversy, and the other notes.

From the case as now presented, we cannot see that the defendant either proved or offered to prove any defence whatever to the notes.

The defendant, when he sold his interest in the mill to Nichols, in Feb'y, 1836, did not require Nichols to indemnify him against the six notes which had been executed to the plaintiff, and for any thing which appears in this case, the defendant may have received of Nichols the full value of the premises, viz: the third owned by him ,and which he deeded at that time. The testimony did not prove, or tend to prove, that the note in suit had ever been paid by Nichols, or that any contract had been made between Nichols and the defendant, Bugbee, with the assent of M'Gregor, by which Bugbee was to be exonerated from the payment of the notes, and the plaintiff to look to Nichols for the pay. This of course disposes of the defence.

The agreement, which was proved by parol, made on the 5th March, 1838, was for the benefit of Gilman, principally, to which the defendant was not a party, and moreover was entirely controlled by the contract, evidenced by the receipt executed in September, 1838, by the plaintiff to Nichols.

The bill of exceptions is not drawn up with that precision and accuracy which is desirable. The practice of detailing, in the bill of exceptions, all that passes at the trial, is too common. It would be better if the judges who allow these exceptions,—and we are all faulty in this particular,—would strike out all the superfluous matter which is usually inserted by the counsel, inasmuch as it tends rather to confuse and obscure the real point in controversy.

The only questions of law which were decided by the court below appear to be these, that the receipt executed by the plaintiff to Nichols, in September, 1838, was the best and only evidence of the contract between them, and unless this was rescinded, and another one subsequently made, as contended for by the defendant, it could not be altered, varied or explained by parol evidence, and further that Nichols had an unquestionable right to receive the pay on the notes given him by Gilman, or control, or dispose of them as he thought proper, as the defendant was not proved to be a party to, or any way interested, legally, in the transactions between the plaintiff and Nichols and Gilman. Whether on proof of other facts, the defendant can succeed either at law or equity in compelling an appropriation of the avails of the Gilman notes to his benefit, is not a question now before us.

The judgment of the county court is affirmed.

JAMES BELL *v.* CHARLES ROBERTS.

If an officer be required to make a levy upon real estate, and make the levy so defective that no title passes by it, he is liable to an action and to nominal damages, notwithstanding he shows that the debtor had, at the time, no valid title to the land.

THIS was an action on the case for damages arising from a defective levy of the plaintiff's execution against Nathaniel Sinclair upon a piece of land in Hardwick, by P. Bliss, a deputy appointed by the defendant, who was sheriff of Caledonia county. Several defects are set forth in the declaration, only one of which was relied on at the trial, viz: that the sheriff's return did not show that the justice of the peace, who appointed the appraisers, could by law judge between the parties in civil causes. The defendant pleaded the general issue which was closed to jury.

On the trial in the county court, the plaintiff introduced the record of the judgment in his favor against Sinclair and the orignal execution issued thereon, together with the officer's return of his levy, which were read without objection, and here rested his case. The defendant offered in evidence, to defeat the plaintiff's right of recovery, a certified copy of a deed from Nathaniel Sinclair to his son, Stephen

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A. Sinclair, dated August 22d, 1833, of the premises levied on, and of certain other real estate lying in Hardwick, and also a copy of a deed from one William Gray to N. Sinclair, dated the 8th day of June, 1833, conveying the premises in question, both of which were objected to by plaintiff, as incompetent evidence for any other purpose than to mitigate damages, which objection was overruled by the court, and said copies of deeds were read to the jury. The plaintiff then introduced testimony tending to prove that his debt existed against said Nathaniel Sinclair prior to the date of said deed from Nathaniel, to Stephen A. Sinclair; that said deed was fraudulent as against the creditors of said Nathaniel; that, at that time, the grantee, Stephen A. Sinclair, resided in Lisbon, N. H. and was not present to take the delivery of the deed, or to assent to it, but that there had been a previous contract that such deed should be made, and that he had ever since resided without this state, and that he had never since been in Hardwick. The plaintiff also introduced evidence tending to show that said conveyance to his son was fraudulent in fact, and made without valid consideration,&c.; that afterwards, when said conveyance was made known to the grantee, no consideration was paid therefor to the grantor, and no credit given, or release or discharge given for any claim or demand, which the said grantee held against the grantor, if he held any. The defendant introduced testimony tending to sustain the validity of the deed from Nathaniel to Stephen A. Sinclair. The plaintiff requested the court to charge the jury, that, if they should find that there was no fraud in fact in the execution of the said deed of N. Sinclair, to S. A. Sinclair, yet the plaintiff would be entitled to recover, at the least, nominal damages; that if they should find that said conveyance was made and placed on record by the grantor, without the knowledge or assent of the grantee, it would be inoperative and void as against creditors, whose debts existed at the time of said conveyance, even though it might be valid as between the parties; that the same effect would follow if they should find that no consideration was directly paid by the grantee to the grantor, and if made on account of indebtedness by the latter to the former, it would also be void, unless they should find that the evidence of such indebtedness was, in whole, or in part, given up, or some re-

lease or discharge of the same, *pro tanto*, was given to show that such indebtedness by consent of the grantee had ceased. The court declined to charge as requested by the plaintiff, but charged the jury, among other things, as follows: "that 'if the deed was not fraudulent or in any other way inopera-'tive, it would defeat the plaintiff's action; that if made 'and placed on record without the knowledge of the grantee, 'but in pursuance of a previous contract, and in payment of a '*bona fide* debt, the consent of the grantee should be pre-'sumed, and the deed would take effect from the time it was 'put on record, if such was the intention of the grantor, and 'this would be the case even as against other creditors at 'the time; that if this was done in payment of a *bona fide* 'debt it would not be indispensable to the validity of the deed, 'that such debt should be formally released or given up, or 'discharged, but if that were not done, it would afford ground 'for presuming the deed fraudulent."

The jury returned a verdict for the defendant and the plaintiff excepted to that part of the charge of the court which is above set forth.

(The arguments of counsel upon points not decided in this court are omitted in reporting the case.)

C. Davis, for plaintiff.

Under the instructions which the county court gave, the jury, by their verdict, established the validity of the conveyance, from Nathaniel to Stephen A. Sinclair. The question now arises whether such finding necessarily defeats the plaintiff's right to even nominal damages. We insist it does not. That it should operate, as well as the quieting act of 1837, to diminish the damages, is admitted. Nevertheless it was surely the right of the creditor, if he supposed the conveyance to Stephen A., to be without consideration, and fraudulent as against then existing creditors, he being one of such, to direct the officer levying his execution, to levy it on the land so conveyed, with a view to test the validity of it, and in order to do that, it was essential that he should have a levy regular in point of form. Without that, he could in no way impeach such conveyance. The creditor has a right, then, as between him and the officer, to whom he pays the legal fees for such service, to require that it be done in the

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manner required by law. At the time the plaintiff brought this action, he could not, however desirous of trying the title of Stephen A. Sinclair, bring an action of ejectment against him, because the officer had failed to perform the duty he had undertaken, in a proper manner, and the plaintiff would have failed in the action for that reason, without reaching the question at issue between him and Stephen A. Is not this, then, a damage, nominal, and to the amount of the fees paid? The plaintiff resorted to the only remedy open to him, a suit against the officer, who attempts to defend himself for his acknowledged neglect of duty by interposing the merits of another person's controversy with the plaintiff, a person between whom and the officer there was no privity of interest or title whatever. It is not competent for the officer to do this so as to exonerate himself wholly from liability. To show the analogy between this and other cases, when nominal damages have been recovered, we cite the following authorities:—*Prescott* v. *Truman*, 4 Mass. R. 627; *Garfield* v. *Williams*, 2 Vt. R. 327; *Joy* v. *Hull*, 4 Vt. R. 455; *Richardson* v. *Dorr*, 5 Vt. R. 9; *Selfridge* v. *Lithgow*, 2 Mass. R. 374; *2d. Cong. Soc. of Bridgwater* v. *Howard*, 16 Pick. R. 206; *Deloongue* v. *Norris*, 7 Johns. R. 358; *Stanaul* v. *Eldridge*, 16 Johns. R. 374; *Weld* v. *Bartlett*, 10 Mass. R. 470; *Spear* v. *Hubbard*, 14 Pick. R. 143; 14 Johns. R. 376.

B. N. Davis, for defendant.

Was the testimony offered by defendant, showing the execution debtor had no interest in the premises levied upon, properly admitted by the county court, to prevent defendant's right of recovery?

Whatever evidence went to show the plaintiff had sustained no injury, would destroy his action, and ought, therefore, to be received under the general issue of not guilty.

Thus in an action for beating plaintiff's servant, *per quod servitium amisit*, the defendant may give in evidence, that plaintiff did not lose his service; for that is the injury charged, and denied by the plea of not guilty. 1 Esp. Dig. 653; Willes, 45; Bull. N. P. 78.

So in an action against the sheriff, for not seizing, upon execution, chattels, which he had attached on the original

process — it was a good defence, that such chattels were the property of strangers, and not of the debtor. *Fuller* v. *Holton*, 4 Mass. R. 498; 3 Vt. R. 49; 10 Mass. R. 470; 8 Johns. R. 185; 15 do. 147.

The opinion of the court was delivered by

REDFIELD, J.—The court think the plaintiff in this case, at all events, entitled to recover *nominal* damages. If the officer was required, as in the present case, to do an official act, which did not subject him to an action from any one, it was his duty to do the act in a legal manner. And whether it would avail the creditor, was no matter of concern to him. If the creditor saw fit in this manner to try the title of his debtor to real estate, it was his right to have a perfect levy, in the first instance, and, as we decided when this case was in this court before, (13 Vt. R. 582,) that the levy having become perfected by time, did not constitute a full defence to the action, so now the fact that the debtor had no title to the land, at the time of the levy, will have no more effect. It shows that no substantial damage has been sustained, but does not take away the right of action.

Judgment reversed and new trial.

JOHN ARMINGTON and others *v.* The Towns of BARNET, RYEGATE and NEWBURY.

The act of the legislature, passed in 1839, authorizing the supreme and county courts to take the franchise of a turnpike corporation for a public highway, is constitutional.

PETITION of John Armington and three hundred and twenty one others, filed in this court, praying the court to appoint commissioners for the purpose of laying out and establishing a public highway through those parts of the towns of Barnet, Ryegate and Newbury over which the road of the Passumpsic Turnpike Company runs.

The legislature, at their session in 1839, passed an act relating to highways, the first section of which is as follows:

"Whenever there shall be occasion for any new highway in any town or towns in this state, the supreme court and

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'county courts shall have the same power to take any real estate, easement or franchise of any turnpike or other corporation, when, in their judgment, the public good requires a public highway, which such courts now have by the laws of this state, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed in making compensation to all such corporations and persons, whose estate, easement, franchise or rights shall be taken, as are now granted and provided in other cases:—*provided*, that no such real estate, easement or franchise shall be taken in the manner and for the purposes aforesaid, unless the whole of such real estate, easement or franchise belonging to said [such] corporation shall be taken, and compensation be made therefor.

Commissioners were appointed under said act, who reported, among other things, in substance, that, having notified the parties in interest, and heard the testimony by them introduced, and having examined said turnpike road, &c., they found that the public good required that there should be a road through the towns of Barnet and Ryegate to Wells River, in Newbury, on the track of the Passumpsic turnpike, free from tolls; they therefore surveyed and laid out a public highway, upon the track of said turnpike, and awarded the sum of four thousand dollars to said turnpike company, as the full value of their franchise;—seventy six dollars to be paid by the town of Newbury; $2.094, by the town of Ryegate, and $1.830, by the town of Barnet. Other facts were stated in the report, but, as the case was decided wholly upon the constitutionality of the act of the legislature, above recited, it becomes unnecessary to make a fuller statement in reporting the case.

The towns of Barnet and Ryegate, and said turnpike company filed exceptions to the report, insisting that said act of 1839 was unconstitutional, &c.

C. Davis, for defendant.

A turnpike may be laid over a free road for short distances, when necessary, *Com.* v. *Wor. T. P. Co.* 3 Pick. R. 327; but a gate cannot be erected on such road. *Wales, Tr. of B. H. T. P. Co.* v. *Stetson*, 2 Mass. R. 143.

Nor can a free road be laid over a turnpike. *West Boston*

Bridge v. *County Com. of Middlesex*, 10 Pick. R. 270. It is not necessary that towns should have a right to a suit for their expenditures; though, in one case, and probably both, they could maintain suits.

Mere voluntary expenses could not be recovered. 2 Pick. 41. This report must be accepted or rejected entirely. 1. If a franchise is taken for public use, it must be wholly taken. Act of 1839. 2. The act of 1839, we insist, is unconstitutional, being repugnant to the constitution of the United States, which prohibits any state from passing any act impairing the obligation of contracts. The grant of the charter of the company was a contract within the meaning of this clause. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Caledonia Co. Grammar School* v. *Burt*, 11 Vt. R. 632; *Starr* v. *Robinson*, 1 D. Ch. R. 257; *Pingree* v. *Washburn*, 1 Aik. 264; *State* v. *Bosworth*, 13 Vt. R. 402; *Fletcher* v. *Peck*, 6 Cranch, 87; *Terret et al.* v. *Taylor et al.* 9 Cranch, 43; *State of New Jersey* v. *Wilson*, 7 Cranch, 164.

That the contract will be violated if this proceeding is consummated admits of no doubt. The charter is to be wholly abrogated, if any thing is done.

To whom is the compensation to be made after the corporation is dissolved? How can it enforce a decree or take an execution, or sue the officer for neglect? An act of the legislature, taking away the franchise directly, it is admitted, would be unconstitutional. Can that be done indirectly through the aid of commissioners and the supreme court, which could not be done directly?

The right of eminent domain, or of taking private property for public use, on making adequate compensation, we freely recognize, as generally practised and understood, i. e. to take land, timber, and other material things. It has seldom been applied to incorporeal rights, or corporate premises. If it can ever be done, it is only in extreme and urgent cases. 14 Wend. 51; 1 Bald. C. C. R. 205; 18 Wend. 14, 15; 2 Pet. R. 657, Story's Opin.; 5 Paige, 146, 160; 7 Cow. 585; 17 John. 195; 23 Pick. 360.

At all events, if the act may be regarded as constitutional, with the court rests the power of judging in what cases it should be applied. And the court will not, as a matter of

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sound discretion, act under it, except in a case of strong necessity, so as to cause the destruction of the contract between a corporation and the state.

3. It has been suggested that the towns cannot avail themselves of this question. As a constitutional question any party, whose interests are affected, can raise the question. If defendant towns are called on to pay a larger sum of money for damages, when no damages accrue by reason of the charter remaining untouched, it would be strange if they could not object. As a matter of discretion merely it is competent for the towns to present any reason why the court should not abrogate the charter.

E. Paddock, for petitioners.

1. The powers of our legislature are as broad and boundless as are those of the British parliament, and we find the parliament may dissolve a corporation. 1 Black. Com. 485. And when a turnpike corporation is dissolved, the land over which the easement or corporate property extended, reverts to its former owner. 1 Bl. Com. 484. And if, by operation of an act of parliament, a corporation may be dissolved, then the same authority may direct the doing of that which shall render the charter inoperative, and that is the case now under consideration.

2. If it shall be considered that the legislature have not power directly or indirectly to vacate a charter, or recall a grant, yet, in this case, they have a legal right to compel the corporation to yield their rights, and accept an equivalent; 1 Bl. Com. 139; and this the legislature has done. This is no new thing in the state, for all our road laws are based upon the same principle. The act of 1839 proposes nothing new in the principle of building roads, but simply declares that private property, held by a tenure less than *fee simple*, may be taken and appropriated to public use, by paying an equivalent therefor; as property held in fee simple always has, and may now be taken.

The opinion of the court was delivered by

REDFIELD, J. — The only question arising in the present case, is, as to the constitutionality of the statute of 1839, authorizing the supreme and county courts, in the state, to

take the franchise, or easement, of any turnpike corporation, when, in their judgment, the public good requires a public highway over such easement, or the land in which such easement exists.

It is now too late in the day, and the law upon this subject is too far settled, to go into the discussion of elementary principles. No one now questions the right of the highest judicial tribunal in a state to declare an act of the legislature void, when its provisions conflict, either with the state or the United States constitution. On the other hand, it is, at this day, I apprehend, equally well settled, that no court can pronounce any act of the legislature void, for any supposed *inequality* or *injustice* in its *intention*, or its *operation*; provided it be upon a *subject-matter* fairly within the *scope* of *legislative authority*, and the provisions of the law be *general*. Hence it is true, no doubt, that the legislature, by *general* enactments, might tax any given species of property, either private or corporate, to the full value of the property itself; for the power of taxation, when once conceded to the legislature, over any given subject, "implies the power of destruction" even, as was declared by the court in the case af *M'Culloch* v. *The State of Maryland*, 4 Wheaton, 316. And the legislature having, in the present case, referred the question of discretion, as to the necessity of taking the franchise, to the courts, can make no difference, so far as regards the present question.

The only question which we now propose to consider is the power of the legislature to take the road of a turnpike company, for a public highway, upon making adequate compensation. This is the first time this court have been called upon to discuss this naked question. But similar questions have been before us, arising under the same act; and the question has, of late, been so fully discussed, both in the national and state tribunals, that little more remains for determination, unless we are prepared to disregard the aid and authority of those numerous determinations which have so commended themselves to the learning of the profession and the good sense of the public generally, that one, who should now attempt to run counter to their general current, might incur the imputation of rash, self-confidence, if not the suspicion of foolhardiness, even. This is not said as a justifica-

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tion for an opinion, which is esteemed questionable in its principles, but as an excuse for foregoing the labor of an extended discussion of the foundation of those principles, which is much better done in the cases which will be referred to. In all cases of constitutional law, the determinations of the state tribunals, upon similar questions, are entitled to very great weight; but, in a case like the present, where the act is alleged to contravene the provisions of the United States constitution, the decisions of the national tribunals, upon the point, are of paramount authority. We come, then, to a brief consideration of the question involved, upon the grounds thus indicated.

It is not claimed, I apprehend, as I have before said, that there is any power in this court to declare the statute in question void, except so far as it shall be found *fairly* and *necessarily* to conflict with some *express* or *necessarily implied* provision, either of the state or United States constitution. It is not claimed that this statute does conflict with any such provision of the state constitution, or with any portion of the United States constitution, unless it be that which prohibits the states from passing any "law impairing the obligation of contracts." Art. I., sec. 10. The general power of the legislature to take private property for public uses, upon making adequate compensation, is universally conceded, and seems to be expressly granted by our "declaration of rights," part first, state constitution, article two: "That private property ought to be subservient to public 'uses, when necessity requires it; nevertheless, whenever 'any person's property is taken for the use of the public, the 'owner ought to receive an equivalent in money."

It has never been questioned, that the legislature had the full power to take private property for the purpose of public highways. They may grant this power to a private corporation, as was done to the defendants. It is now settled, in most of the states, that this privilege may be granted to a rail-road corporation, which is considered but an improved mode of constructing highways. *Bonaparte* v. *C. & A. Rail Road Co.* 1 Baldwin's C. C. R. 205; *Rail Road Co.* v. *Davis*, 2 Dev. & Bott's North C. R. 451; *Bloodgood* v. *Mohawk & H. R. R. Co.* 14 Wend. R. 51, and same case again 18 Wend. 1; *Louisville C. H. R. R. Co.* v. *Chappel*,

1 Rice's S. C. R. 383. But it is argued that such a grant, when once made to a private corporation, is a contract, irrevocable, and inviolable. No doubt it is such, just as much, and no more, than was the original grant of the land. All land is, in fee, the property of the sovereignty. Originally it forms a portion of the public domain, until parcelled out to private persons, either natural or artificial. All such grants are contracts, irrevocable, and inviolable. Hence if there be a condition, beneficial to such grantees, annexed to the grant; as, for instance, that such land shall be forever exempt from taxes, this exemption becomes perpetual. *State of New Jersey* v. *Wilson*, 2 Pet. Cond. R. 457; *Herrick* v. *Randolph*, 13 Vt. R. 525. The same is true of the grant of any corporate franchise. But there is no sound reason why the one case of grants should be esteemed any more sacred than the other. Both classes of grants are always understood to be made subject to those reserved rights in the state which are indispensable to state sovereignty. For instance, the grant of the fee in land to private persons does not authorize them to exercise any of the acts of sovereignty, as such, even within the bounds of their own territory, or of resisting the proper sovereign in the exercise of those rights. Those reserved rights of sovereignty, which, by law writers, are denominated the right of eminent domain, always exist as a condition, or implied reservation, in all these grants, whether of lands in fee, or of corporate franchises.

While, on the one hand, it is admitted, that no grant of the legislature, of either of the above descriptions, can be revoked or repealed in express terms, it must be conceded, that this right of eminent domain will always enable the legislature to take the benefit of the grant from the grantees, *for public use.* But this is one of those rights of sovereignty, which, to be of any avail, must be general and unlimited, and when it is remembered that it cannot be done without the "owner receiving an equivalent in money," and that the legislature are always exercising it by general laws, and upon their own constituents, there is but little danger of abuse. Hence, it was decided in the case of *Charles River Bridge* v. *Warren's Bridge*, 11 Peter's R. 539, that the legislature might grant a free bridge parallel with, and as near, as they judged the public good required, to toll bridges formerly

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granted by them, and this upon their general powers, without an assertion of the right of eminent domain in the land, out of which the franchise was granted, and of course, without compensation. After this decision, which, in regard to the United States constitution, must be considered a binding authority, it surely cannot be doubted, that the legislature have the right to take the franchise, upon making a full equivalent to the corporation. This latter course seems to me to be the true one. It cannot escape the observation of any one that the lapse of almost half a century, since the grant of this franchise, must have made a very considerable difference in the public wants, and the public claims to an open highway. If this franchise is not absolutely perpetual and uncontrollable, the time has doubtless come for the legislature to assert its right to interfere, and establish such a highway as the public exigencies *now* require. And in doing it, in this mode, there is no appearance of quibbling, or evasion, or of injustice and severity, which, whatever may be thought by the learned of the soundness of the decision last quoted, 11 Peters, 539, will be likely to be objected to it by plain, simple, unsophisticated, and unprejudiced minds. It is no doubt a sound *legal* decision, and the only one the *court* could have pronounced; but, unfortunately, it is not easy to assign reasons which very strongly commended themselves to our *sense of justice*. We are apt, in that case, to confound the decision of the court with the act of the legislature. While all now admit that the decision is sound and the *act* constitutional, it is, nevertheless, a precedent in *legislation*, that will not be likely to be often followed, and never, except in the most extreme cases. The present case is free from all show either of injustice or severity.

The report is accepted, and the road established and ordered to be opened, and the damages and costs paid in one year.

The Town of KIRBY *v.* The Town of WATERFORD.

Under the first section of the act of 1797, relating to legal settlements, it was a sufficient payment for real estate purchased of a greater value than $100, if the purchaser acquired a title to the same, and paid at least $100 towards it, provided no lien was created upon the estate for the balance of the purchase money.

Two justices ordered the removal of Mary Olive Goodhue from Kirby to Waterford, on the ground that she had a settlement in the latter town derived from Ephraim T. Goodhue, her father. On appeal from the order, the appellants pleaded that the pauper was unduly removed, because her legal settlement was not in the town of Waterford. Upon this plea issue was joined and a trial had.

The plaintiffs claimed that said Ephraim T. Goodhue acquired a settlement in Waterford, as well under the first section of the act of 1797, as under the fourth section of the act of Nov. 6, 1801. They accordingly gave in evidence an absolute deed in fee from one Adams to said Goodhue, duly executed, acknowledged and recorded in November, 1797, of one hundred acres of land in Waterford of the price of $250, and introduced evidence tending to show that he paid $100 towards said land, at or near the time of receiving said deed, and the residue within four years thereafter; — that he occupied and improved said land for several years next succeeding his purchase, and continued his residence in Waterford until more than one full year after said act of 1801 came in force. On the part of the appellants evidence was introduced tending to disprove all this, except the fact of receiving the deed by Goodhue and paying for the land as claimed by the plaintiffs.

The court charged the jury, among other things, "That the estate must have been of the value of one hundred dollars or more, and that Goodhue must have acquired the absolute title to the whole tract, and must have actually paid therefor one hundred dollars or more; but that it was not necessary he should have paid the entire purchase money, if the balance was not secured by lien upon the estate." The bill of exceptions embraced other parts of the testimony, and other decisions at the trial; but as they were omitted in the

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argument before this court, it is deemed unnecessary to notice them in stating the case.

C. Davis, for appellants.

The only question we raise in this case is, whether the construction put upon the first clause of the first section of the act of March 3, 1797, by the county court, was correct. The language of the act is, "that every person who shall purchase a freehold estate of the value of $100, and shall have *bona fide* paid therefor, and shall actually occupy and improve the same for the term of one whole year," &c. To the main part of the instructions which the court gave to the jury, on this head, we have nothing to object. In one particular, indeed, they were more favorable to defendants than was asked for by defendants' counsel; we mean in reference to the time of payment, which the court decided should be made before the occupation commenced; whereas, defendants' counsel supposed that, if it were made within one year, it would be sufficient. On a close examination of the clause we are satisfied the view the court took of that matter was right. But on one point, and that a material one, we think the court erred; viz. when it was decided that payment of only a part of the purchase money, if to the amount of $100, would satisfy the language of the act. This language seems to us plainly to require that the freehold should altogether be of the value of one hundred dollars, and that the whole estate should have been paid for, however much it may have exceeded that value. The term "paid therefor" must mean paid for the estate, and cannot, without great violence, be construed to mean payment of as much as $100 towards it.

There are substantial reasons for our view of this subject, other than a correct grammatical construction of the terms. The law intended, no matter with how much or how little reason, to confer a settlement upon the actual proprietor of real estate of not less than a certain value, who did not remain indebted for the whole or any part of the purchase money, and who should have actually improved and cultivated it for one year. The propriety of such a provision at that early day, when most of the towns in the state were new, and it was a matter of policy to invite immigration from other states, is sufficiently obvious. It could not have en-

tered into the contemplation of the framers of that act, that the purchase of a tract of land of the value of several hundred dollars, for which $100 only should be paid down, while the purchaser remained indebted for the remainder, with a mortgage thereon to secure the payment, the result of which they well knew, and experience has proved, was too often a foreclosure, and the loss of the sum paid—it never could have been in their contemplation that such a purchaser acquired a settlement thereby. If so, they would surely have used language better adapted to convey their meaning. The court seem, indeed, to have been aware that the existence of a lien for the unpaid portion of the purchase money, would present a case in which their construction of the act would defeat the manifest objects of its framers.

There is nothing in the act, however, to countenance a distinction between those cases where the balance due is charged upon the land and where it is not. It would be no more a payment in one case than in the other, provided it remained a subsisting outstanding debt. It appears, in this case, that, with the exception of about $100, paid about the time of taking the deed, the purchase money remained unpaid for about four years; but whether secured by mortgage on this or other land, or neither, does not appear.

Upham and *Hibbard*, for the plaintiffs, cited 3 Stark. Ev. 1327; Burr. Set. C. 57; 2 Doug. R. 630; 3 T. R. 114; 6 do. 755; 2 Pick. R. 29; 4 Mass. 384; 11 do. 327; 13 do. 460; 5 Pick. R. 449; 19 do. 294; 21 do. 233; 2 Conn. R. 600.

The opinion of the court was delivered by

ROYCE, J.—The only question submitted is, whether Ephraim T. Goodhue acquired a settlement, in Waterford, under the first section of the act of A. D. 1797. The words are—"every person who shall purchase a freehold estate, of 'the value of one hundred dollars, and shall have *bona fide* 'paid therefor, and shall actually occupy and improve the 'same, for the term of one whole year, shall be deemed and 'adjudged to have obtained a legal settlement in such town 'or place."

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It appears that Goodhue, on the 17th day of November, A. D. 1797, purchased, and took a deed of a lot of land in Waterford, and it is not now disputed that he actually occupied and improved the same for one full year. The question is, whether he "paid therefor" within the meaning of the statute. The price was two hundred and fifty dollars, one hundred of which was paid immediately, and the balance within four years after the purchase was made. This court concur in the opinion expressed in the charge of the judge, —that, if one hundred dollars was paid toward the land and a deed taken, and no lien upon the land created for the balance, it made a case within the statute. Upon those facts it may be truly said that Goodhue purchased and paid for land to the amount of one hundred dollars, while he acquired an unincumbered title to a much larger quantity.

There is another view of the case, which to me appears to exhibit a more literal compliance with the statute. I infer from the bill of exceptions, that the whole payment was completed whilst the act of A. D. 1797, continued to govern the case; the question then arises, whether payment for the land was required, either to precede the year's occupancy, or to be cotemporaneous with it. It strikes me that this was not exacted by the statute. The occupancy and payment were distinct requirements of the law; neither alone could give a settlement; but when both had been performed (the statute remaining in operation) the settlement was gained. And if this construction should appear to require a continued residence of the person in town till his payments were completed, such would seem to have been the case in this instance. At all events it is certain that Goodhue took up no other residence in the state during that period, nor does it appear that he conveyed away the land. Hence I conclude that, allowing the statute to require full payment for the land as well as the year's occupancy, it is still satisfied by the facts of the present case. I understand, however, that the former ground is the one on which the court prefer to rest the decision.

Judgment affirmed.

TOWN of BARNET *v.* PASSUMPSIC TURNPIKE COMPANY.

(In Chancery.)

When a town has expended money in making a public road, and a turnpike is laid on the same road, the town have no claim against the turnpike company for compensation for making the road, which can be enforced at law, or in equity.

A court of equity will not relieve a party from the consequence of not complying with a condition precedent, when the non compliance arose from inattention or negligence.

THIS was an appeal from a decree of the court of chancery, ordering the defendants to pay the orators a certain sum expended by them in making a road, upon which the defendants afterwards laid their turnpike. The bill was answered, the answer traversed, and testimony taken. The substance of the bill, answer and evidence, sufficiently appears in the opinion of the court.

W. Upham, for defendant.

1. The complainants are not entitled to the relief sought, because the defendants had a legal right to lay their road on the public highway in question. *Searsburgh T. Co.* v. *Cutler*, 6 Vt. R. 315, 324; act of 1822.

2. There is no equity in the claim set up in the bill, because the taking of the town road saved the inhabitants the expense of repairs, and exonerated them from all liability for "special damages" which might have happened upon it.

3. Up to the time of filing the bond by the order of court, the orators had no claim against the defendants, for the road in question, which could have been enforced. The order of court directing the bond, created no debt against the corporation. If no bond had been filed, no indebtedness would have existed. If the bond had been accepted by a vote of the town within the time limited in its condition, it would have created an indebtedness; but the failure of the town to vote an acceptance, has rendered it inoperative and void. Newland on Cont. 243, 244. The orators have no legal or equitable claim under the bond, for they neglected to perform the *condition precedent* upon which it was to become obligatory. *Wells* v. *Smith*, 2 Edward's Ch. R. 78; *Hud-*

son v. *Bartron*, 3 Madd. R. 440; *Levy* v. *Lindon*, 3 Mein. 84; *Bochno* v. *Wood*, 1 Jac. & Walker 419; *Williams* v. *Edwards*, 2 Sim. R. 78; Co. Litt. 206, a; *Harvy* v. *Aston*, 1 Atk. R. 360, West's R. 350; *Reymirh* v. *Martin*, 3 Atk. 330; *Scott* v. *Tyler*, 2 Bro. Ch. R. 431; *Powell* v. *Pollett*, 2 Eg. Ab. 209, pl. 3; *Sweet* v. *Anderson*, 2 Bro. Ch. R. 256; *Duffield* v. *Elens*, 1 S. & S. 229; *Long* v. *Rickett*, S.& S. 179; *Clifford* v. *Bearmont*, 4 Mass. R. 425; 1 Sugden's Law of Vendors, 516, 517; *Bendict* v. *Lynch*, 1 Johns. Ch. R. 634, 6 Cowen, 624. There is a difference between conditions precedent and conditions subsequent. In *Popham* v. *Banfield*, 1 Vern. 83, it was said that precedent conditions must be literally performed, and that a court of equity will never vest an estate, where, by reason of a condition precedent, it will not vest at law. But of conditions subsequent, which are to divest an estate, it is otherwise. A court of equity may relieve to prevent the divesting of an estate, but cannot relieve to give an estate that never vested. *Cury* v. *Bertie*, 2 Vern. 339.

4. The evidence in the case shows that the complainants were in court, by their counsel, when the bond was filed, and they must be presumed, therefore, to have understood upon what condition it was to become obligatory.

C. Davis, for orators, contended that the failure to vote an acceptance of the bond was the result of accident, from which no injury resulted to the opposite party, and it was familiar law that equity will relieve, where, through mistake or accident, a party fails to reap a just advantage from a deed or instrument, particularly where a compensation can be made in money, and cited 5 Ves. 238; 3 Atk. 93; 2 Vern. 594; 1 Bro. C. C. 418; cases cited in Madd. Ch. ch. 2; 1 Har. Ch. 27; Fonbl. Eq. Book 1, ch. 4, §4, §1. n. c. ch. 6, §4.

He maintained that the court had power to prescribe such conditions, by consent rule, as they deemed necessary to indemnify the orators,—such power being constantly exercised in the ordinary jurisdiction of courts of law, *Oliver* v. *Chamberlain*, 1 D. Chip. 41; and it could not, therefore, be questioned in matters of equity. The power to grant or withhold the thing sought, carried with it the right of prescribing conditions; and those conditions being voluntarily assent-

ed to in order to secure the advantage asked for, a perfect obligation resulted to comply with them.

He further maintained that the appropriation of the road in question to the use of a private company created a legal, or at least, an equitable claim to remuneration, upon the principle that private property ought not to be taken for public purposes without compensation, which he argued was as applicable to the property of a town or other corporation, as to that of individuals.

The opinion of the court was delivered by

WILLIAMS, Ch. J. — The object of this bill is, to compel the defendants to pay the sum of six hundred and fifty dollars, expended by the orators in making a road in the year 1828, which was afterwards surveyed and made a part of the turnpike road of the defendants. The claim of the orators is so intimately connected with the proceedings which have heretofore been had in this court on the subject of the Passumpsic Turnpike, and rests so much on the orders which have heretofore been made, that a brief recital of the former proceedings is necessary to a right understanding of the case, and to explain the grounds on which the court have formerly proceeded, and on which they now decide.

The turnpike was surveyed and laid out at an early day, and, as was very usual with the roads laid out at that time, it was found, after the country became more settled, that a better place for the road might have been selected. On the petition of Ira Goodrich and several inhabitants of Barnet, a committee was appointed, who laid out another road between the turnpike, as made, and Connecticut river, which must have taken the principal part of the travel which had before passed on the turnpike road. This road, thus laid by that committee, was made by the town of Barnet, the orators. Under an act of the legislature, passed in 1822, this court, on the petition of the present defendants, appointed a committee to survey, lay out, and alter the Passumpsic turnpike road, who laid out the same on something over a mile of the road laid out by the committee on the petition of Ira Goodrich, and which was made by the town of Barnet, at the cost of six hundred and fifty dollars. The committee, who thus re-surveyed the turnpike, made a report and return of their

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doings at the term of this court in 1830. It was a matter of doubt, and a question upon which the members of the court were never fully agreed, whether any decision of the court was required, to accept the report, or whether the court had any further jurisdiction over the subject after they had appointed the committee. The report was, however, retained on the docket, and not accepted until the March term, in 1834. To the acceptance of this report the town of Barnet objected; and, in all the controversies about the same, appeared by attorney.

A *scire facias* was instituted, in behalf of the state, against the turnpike company to repeal their charter. A trial was had, first on demurrer, and then on an issue of fact, and a verdict was returned against the corporation, that their charter was forfeited; and, in pursuance of a provision in the statute, they made application to the court in writing, and set forth reasons why the charter ought not, in equity, to be forfeited. The objections to the report of the committee, laying out and altering the turnpike road, and the application of the turnpike company, in equity, that the forfeiture should not be adjudged, were heard together, at the term of this court in March, 1834. Before entering up any judgment in either of the cases, the court required the bond to be executed and deposited with the clerk, which is set forth in the orator's bill; and, on the filing of that bond, judgment was entered up, that the report of the committee laying the turnpike road, be accepted, and that the charter of the company, in equity, ought not to be forfeited. The condition of the bond is, that Stevens, who represented the turnpike company, should pay the town of Barnet the sum of three hundred and twenty-five dollars and interest, on or before the first day of April, 1835, and the like sum of three hundred and twenty-five dollars and interest, on or before the first day of April, 1836; to which there was this proviso, "that the 'town should accept said bond on or before the first day of 'August then next, or said bond shall be void; and further, 'that the bond shall be deemed and taken to be in full pay-'ment and satisfaction of all claims or demands in favor of 'said town of Barnet against the Passumpsic turnpike com-'pany, for making of any road in said Barnet, and accepted 'by said turnpike company as part or parts of their turnpike

'road." The following entry was made on the docket of the clerk, "the bond to be delivered to the agent of Barnet, 'after vote of acceptance of said town." The town of Barnet did not accept the bond until the 11th of November, 1834, more than three moths after the time limited for them to accept. On that day they voted to accept the sum of money mentioned in the bond signed by Henry Stevens and James Gilchrist; and, at the same meeting, they authorized their selectmen to settle with the company concerning the bond, or prosecute the same at their discretion.

The claim of the orators, to the relief asked for in this bill, must be supported, either on the ground that they have an equitable claim against the defendants, arising from their having made the road, which was afterwards covered by the survey of the turnpike, made by the committee appointed by this court, or in consequence of the bond which was left with the clerk for their benefit, as before mentioned. Neither of these grounds are tenable.

In making the road laid out by the committee, on the petition of Ira Goodrich, the town performed a duty to the public, imposed on them by law, — not for their own benefit particularly, or exclusively, but for the use of the whole community. They had no property in the road whatever, more than any other town, or any individual. The burthen of making the road, and of keeping it in repair, was laid on them by law, from considerations of public policy alone. This duty is frequently cast on towns against their wishes, and also against their individual interest. The same power which authorized the laying the road could discontinue it at any time; and the road would revert, not to the town, but to the individuals who are owners of the land. In laying, altering, or discontinuing roads, it has never been thought, or considered, that the towns were entitled to any compensation for the moneys by them expended in making the road. Whenever a turnpike is granted, it is supposed that between the *termini*, they will have to take part or parts of a road already made by towns, and the right to locate a turnpike road on any old highway has been repeatedly recognized by this court in cases reported and not reported. The easement which the public acquired, or the right to pass over a highway, legally made and opened, they may relinquish at any

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time they think proper, or grant it to corporations by them established. *Cutler* v. *Searsburg Turn. Co.* 6 Vt. R. 315; *Panton Turn. Co.* v. *Bishop*, 11 do. 198. In the conflicting opinions which the court have heretofore had, on the subject of this claim of the town of Barnet to compensation for making that road, I never understood any of them to say that the town had such a claim, recognized as a legal or equitable claim, which could be enforced in a suit at law or equity. And the judge who gave the opinion in the case of the state against the present defendants, reported in 3 Vt. R. 178, seems to insist rather on the apparent justice of the claim, and that the court should not accept the report, and enable the turnpike company to take the road, until they made some satisfaction to the town for the money expended by them in making this road. It never struck me that it was necessary for the court to accept the report of the committee appointed to alter the Passumpsic turnpike road; but that, having appointed the committee, their powers over the subject ceased; nor was it ever made to appear satisfactorily to me, that the town should have any remuneration from the company, inasmuch as they were relieved from the expense of keeping the road in repair, and from the risk which every town incurs from their responsibility to individuals for damages. This whole subject, however, has been passed upon heretofore. The court are now agreed in saying, that the orators have no claim which can be enforced in this suit, independent of the orders before named, founded solely on the ground that they made a public road which was afterwards surveyed and taken as a part of the turnpike road owned by the defendants.

The only inquiry remaining is, whether, in consequence of the bond executed by Mr. Stevens, who is considered as the owner of the turnpike, and which is to be treated as a voluntary bond, procured by the defendants, in pursuance of the orders and proceedings had in this court, at their March term, 1834, already recited, the orators have now any claim against the defendants which the court of chancery can decree. The bond was to be void, unless accepted by the town by the first of August next after it was made. Their acceptance was a condition precedent to its being delivered. The orators did not vote to accept it until the November

after. Now we cannot consider that the town had no notice of this bond being left for their benefit. They were a party to the proceedings had in relation to the acceptance of the report, and appeared by their attorney; and we all well recollect the long and assiduous attention, and the powerful and excited argument made against the turnpike company by a gentleman since deceased, and for which, it appears, he made charge against the town. Indeed, we have no hesitation in saying that the towns were so far parties to the proceedings had in this court, that they were bound to take notice of any order made by the court in the premises.

If it was proper for the court to do any thing on this bill, it could not be to set up this bond, which has become void by reason of the town not complying with the only condition on which it was to be operative, but by permitting them again to litigate the acceptance of the report before mentioned, and go into an inquiry as to their equitable claim for compensation, which we have already considered as unfounded.

We cannot discover, in this case, any unforeseen event, loss, or omission, which prevented the town from accepting the bond, or any unintentional act or omission arising from ignorance, surprise, imposition, or misplaced confidence, that should entitle them to relief, on the score of accident or mistake. But they have lost their bond and their security at law upon the same, by their own negligence and want of attention, and the court cannot relieve them from the consequence of their non-performance of the condition required. And it is somewhat of a remarkable feature in this case that, although there has been litigation on the subject of this turnpike, and between the orators and defendants, in one shape or another, before the court and the legislature, for so long a time, no call should have been made on the clerk of this court for this bond, while it lay with him, for the benefit of the orators, from March to August, and that no vote should be passed by the town to accept it until November after the session of the legislature, and then accompanied with a resolution instructing the selectmen, their agents, to buckle on the armor for battle, or ground their arms, as they should think proper, and report at their next March meeting, in 1835.

We can see no reasons for relieving the orators from the consequence of their not accepting the bond by the time specified, or to decree them the money they expended in making the road. The consequence is, the decree of the chancellor must be reversed, and the bill dismissed, without cost; and the chancellor will be directed accordingly.

BENJAMIN CONNER *v.* JOHN CHASE, ELIHU GRANGER, MARTIN M. MILES, ISAAC KINASTON, JOSEPH G. KINASTON, and JESSE G. KINASTON.

(In Chancery.)

Parol proof is not admissible to show an absolute deed to have been intended as a mortgage, when the grantor conveys by deed of warranty, and possession follows the deed through several successive grantees.

Knowledge of a parol contract, between a prior grantor and grantee, will not affect one who purchases from the person having both the legal title and possession, unless he purchases fraudulently, and with intent to defeat the equitable claim of the first grantor.

Length of time, short of the period which will bar redemption, may afford a strong presumption against a claim set up as an equitable right of redemption, resting wholly on oral testimony.

The answer of one defendant, who has ceased to have any interest in the subject in controversy, is no evidence against the other.

THIS was an appeal from a decree of the court of chancery. The orator, in his bill, which was entered March term 1836, alleged,—That, on the 22d day of January, 1824, he was seized in fee simple of five acres of land, part of the south west corner of lot 41, in Sheffield, with a saw mill privilege; that he had in contemplation to build a saw-mill on said lot, and to that end, purchased of John Chase forty five dollars worth of saw-mill irons, and to secure to said Chase the payment of said sum and interest, on the 23d day of January 1825, conveyed to said Chase, in fee simple, said land, as a pledge or mortgage, to secure the payment of said sum; that said Chase, in consideration that the orator would so convey, promised him that, on payment of said sum and interest, he, said Chase, would quit claim said premises to the orator, and at that time agreed to give a written defeasance to that effect, but whether such defeasance was ever given the orator could not state; but if any was given, it was lost or destroyed.

2. That the the orator, being also indebted to Elihu Granger, it was agreed between Chase, Granger, and the orator, that Chase should assign his claim against the orator to Granger, on payment of the amount by Granger, and that Chase should deed the same premises to Granger, as security for both debts; whereupon, on the 3d day of May, 1824, Chase executed his deed of said premises to Granger. The bill contains the same averment as to Granger's agreement to execute a written defeasance, as before stated, and that said conveyance was understood by the parties as a mere mortgage.

3. That, on the 8th day of November, 1825, said Granger deeded the same premises to Martin M. Miles, for a consideration inadequate for the absolute title, and that he had notice that Granger held only a mortgage title.

4. That on the 8th day of November, 1829, Miles conveyed the same premises to Isaac and Joseph G. Kinaston, with similar averments as to the consideration, and as to notice that Chase's and Granger's deeds were intended only as mortgages. The four deeds above named were absolute on the face of them, and contained the usual covenants of seizin and warranty.

5. That Isaac Kinaston, on the 2d day of December, 1830, quit claimed one fourth part of same premises to Jesse G. Kinaston; on the 28th day of June, 1836, another fourth part to Joseph G. Kinaston; and on the 25th of October, 1831, Jesse G. Kinaston quit claimed to Joseph G. another fourth part; and that all the parties to these several conveyances, had notice of the nature of Chase's and Granger's deeds, and were, therefore, only assignees of their mortgage title to the premises.

The orator prays for liberty to redeem, and that the defendants account for the rents and profits.

The answer of John Chase, admits the facts as to the character of the conveyances from Conner to him, and from himself to Granger, as claimed by the orator's bill.

The answer of M. M. Miles, admits in substance, that he purchased of Granger, with full knowledge that Granger's deed from Chase, and Chase's deed from Conner, though absolute on the face, were intended to operate merely as

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mortgages, and also states conversations between himself, Isaac, Joseph, and Jesse G. Kinaston, which occurred shortly before he, said Miles, conveyed said premises, tending to show that said Kinastons were acquainted with the character of the conveyances from Conner to Chase, and Chase to Granger, and that they purchased *with notice*, as claimed in the orator's bill.

Joseph G. Kinaston in his answer says, "that, as for the consideration upon which, or for which, the said Conner deeded to the said Chase, or the said Chase to the said Granger, he had no knowledge, belief, or suspicion, at the time he received his several deeds from Martin M. Miles, Isaac Kinaston, and Jesse G. Kinaston, that Granger was under any obligation to deed said five acres of land and saw-mill to the said Conner, on the said Conner's paying him a certain sum of money, or paying him any sum of money, or any other thing. Nor has this defendant ever known, or had any suspicion that the said Chase or Granger had agreed with the said Conner for any consideration whatever, to execute a written defeasance to the said Conner, of said five acres of land and saw-mill; but this defendant had frequently heard it said that the land and mill was put into Granger's hands as security for his labor and mill irons, &c., but had no knowledge but that Granger and Conner had settled amicably; the general report, however, was that Granger went off without paying him his due, and that he had wronged him, but how much, or in what way, this defendant never learned until 1835, when Conner published it in the North Star, nor did this defendant possess any other, or different knowledge, information, belief or suspicion in relation to Conner's having any claim in law or equity, upon Chase or Granger for the deeding of said land and mill to Conner, at the time he paid said Miles, and Kinastons for the same, than that which he possessed when he bought the same. As to who built the mill, report says that Conner built it, and that Granger worked for him, but how the facts were, this defendant never had any other means of knowledge. When said Miles purchased said land and mill, this defendant thinks it was not worth over three hundred dollars. This defendant knows nothing of Miles' information in relation to the tenure by which Granger held the premises. As to what Miles paid

Granger for the said land and mill, this defendant has no knowledge upon the subject, except what he has obtained from the records of deeds in Sheffield. This defendant knows that immediately after Miles purchased, he took possession of said Mill and completed the finishing of the same. This defendant knows nothing about the rents and profits before he purchased. And this defendant, further answering, says, that at the time he purchased, with his father, said land and mill, he verily supposed and believed, that Miles had a good and perfect title to the same, and that Conner had no claim or interest in, or demand upon the same, and his knowledge, information, belief, and suspicion, was the same and in no wise changed at the time he made his several payments for the same; if he had not supposed said Miles had an indefeasible estate in fee simple in said land and mill, he should not have been concerned in the purchase; and his knowledge, information and belief was the same and no other when this defendant purchased of his father and brother said premises, and paid them for the same; and this defendant further says, that, at the time he made his several purchases as aforesaid, and payments as aforesaid, he had no knowledge, and did not believe or suspect but what said Chase or Granger, had each a good and indefeasible estate in fee simple in said land and mill before and at the time they respectively conveyed the same; but this defendant has understood that said Conner intended to prosecute the said Granger whenever he could find him and recover what he owed him. And this defendant did not know, understand, believe, or have a suspicion, then, nor before he had fully made payment to said Miles, that Miles' title to said mill and land was only a mortgage, or in the nature of a mortgage, or that Granger's title, or Chase's title was only a mortgage, or in the nature of a mortgage; but did understand that the several deeds from Conner to Chase, from Chase to Granger, and from Granger to Miles, were absolute unconditional deeds, conveying the premises in fee simple, and although this defendant had heard that the mill and land were put into Granger's hands for security for his labor, and materials furnished, yet at the time this defendant purchased and made his several payments, he did not suppose, believe or have a suspicion, that Conner could ever have compelled Chase or

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Granger to redeed to him, unless they, or either of them, were or was so disposed, and if Chase or Granger, while they held the legal title to said mill and land, for security, refused to deed to Conner, Conner was wholly without remedy. Such was his understanding, information and belief upon the subject; and that Conner's interest was not affected by his purchase, or whether said mill remained or should be destroyed, it being irrecoverably gone from him. And this defendant further answering says, that he had not at the time he and his father took and received their deed of said land and mill, of said Miles, nor at the time of paying for the same, any knowledge, information, or belief, nor any notice, information or reason for belief, or suspicion, that Granger received his deed from Chase as security for what Conner owed Granger, in that sense which made it a mortgage, or reserved to the said Conner any more interest in it than every other man had; or that the said Conner could, by paying Granger, compel him by any possible means, to deed the said mill and land to him, the said Conner, against his, the said Granger's will; and yet this defendant says he had heard it reported, before he purchased of Miles, that said land and mill was put into the hands of Granger, as security for his labor and materials furnished by him; but from what source or whether true or false, this defendant did not know."

The defendants, Jesse G. and Isaac Kinaston in their several answers, deny all knowledge of any trust between Conner, Chase and Granger, and declare that they purchased said premises without notice that Conner ever had any claim thereon.

The defendant Granger, being out of the state, made no answer to the orator's bill.

The testimony of a large number of witnesses, tended to show, from acknowledgments made by the Kinastons, from time to time, that they, at the time of their purchase from Miles, and of the subsequent conveyances of the premises in question, were knowing to the fact that the deeds of Conner to Chase, and Chase to Granger were given as *security*, merely, and that Conner still had a claim upon the property.

E. Paddock and *J. Bell*, for defendants.

1. The statute regulating conveyances of real estate, (sec-

tion 4,) is a full and perfect answer to this bill, whether pleaded or insisted on in the defendant's answers. The deed from Conner to Chase contains no condition of defeasance. If any agreement existed between them, it was for a re-purchase and re-conveyance, on payment of a sum stipulated. It was, therefore, an agreement for the sale of land within the meaning of the fourth section. Newland on Con. 200–1; Mitford, 221 ; 2 Johns. Ch. 291 ; 1 Atk. 493. The agreement, if any, created only a personal trust, which did not follow or extend to the land, and as such only can Conner avail himself of it.

2. Parol evidence is inadmissible in this case to contradict and defeat deeds absolute on their face. Its admission would render the statute a dead letter, and open the door to frauds which would subvert the foundations upon which all titles to real estate rest. *Parteriche* v. *Pawlet*, 2 Atk. 384; *Tenney* v. *Tenney*, 3 Atk. 8; *Paine* v. *McIntyre*, 1 Mass. 69; *Rich* v. *Elliott*, 10 Vt. R. 211 ; *Isaacs* v. *Elkins*, 11 Vt. R. 677; *Bentley* v. *Bradley*, 8 Vt. R. 243 ; *Reed* v. *Wood*, 9 Vt. R. 285, & 5 Vt. R. 514 ; Sugd. 98 & 150.

3. This is a case *sui generis*. In all the reported cases there has been an outstanding deed, showing definitely the nature and amount of the claim set up, fixing the amount due, or the duties to be performed, at least showing what *was*, that it might be known what *was not*. Here all that we can learn about Conner's deed we learn from the town records. As to what the agreement was, or what was the amount due, the court have nothing to direct them. It is calling on the court to take a leap in the dark. *Boyd* v. *McLean*, Johns. Ch. 590; *Hine* v. *Dodd*, 2 Atk. 275–6–7. See also *Day* v. *Dunham*, 2 Johns. Ch. 191.

4. The evidence, in this case, consists almost wholly of acknowledgments and statements purporting to have been made by the Kinastons many years ago. Evidence merely parol, though sometimes clearly admissible, will be received with great caution. Evidence of naked declarations, made by the purchaser himself, is, as *Sir Edward Grant* says, "in all cases most unsatisfactory, on account of the facility with which it may be fabricated and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection

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may totally alter the effect of the declaration." Sugden's Law of Vendors, 446. Such declarations ought never to be received as evidence of title. *Jackson* v. *Sherman*, 6 Johns. 21; and opinion of Ch. Kent in *Marks* v. *Pell*, 1 Johns. Ch. 599. See also *Jackson* v. *Cady*, 16 Johns. 335; Sugden, 532; *Foster* v. *Buckman*, 1 Johns. Ch. 300; 1 Mad. 261.

5. No sufficient notice to the Kinastons has been proved. In *Day* v. *Dunham*, Ch. Kent says: "The notice that is to break in upon the registry act must be such as, with the attending circumstances, affect the party with *fraud*, and here certainly is no fraud to be suspected." See also *Hine* v. *Dodd* above cited. See Kent's Comm. 4. See opinions of Ld. Alvanley in *Holland* v. *Stainbridge*, 3 Ves. 478, cited 2 Johns. Ch. 190.

6. This, being a stale claim, ought not to be favored. The plaintiff has slept upon his rights for years, and it is a just rule of law that if one can enter, he *must* enter — he must make his claim. Shep. Touch. 153. It was a fraud in Conner to let his claim lie dormant so many years, while the property in question was passing through so many hands by absolute deeds.

7. If either Isaac, Joseph, or Jesse purchased without notice, Joseph will hold such part. For one may purchase with notice and convey a good title to one who has no notice. And one having notice may take a conveyance from one having no notice and have a good title. 2 Atk. 139, 242; 1 Johns. Ch. 219; 1 Atk. 571; Ambler, 313.

N. Baylies, I. Fletcher & G. C. Cahoon, for orator.

1. *What is a Mortgage?*—2 Story's Equity, 287, §1018. "It is unquestionably true that chancery suffers itself to be little embarrassed with the forms which any transaction assumes. In whatever hand the fee may remain, or however disguised may be the terms, if the real object be the taking or holding land, for the security of a loan or debt, it is in equity a mortgage." *Campbell* v. *Worthington, Ex'r. of Watrous*, 6 Vt. R. 453; *Gibson* v. *Seymour & Hall*, 4 Vt. R. 518; *Williams & Putnam*, v. *Parish et al.* decided in Orange, county, March term, 1831, referred to in 4 Vt. R.

522; 1 Powell on Mort. 116, and cases in Am. Ch. Dig. 338–9.

2. The maxim—*once a mortgage*, always a mortgage. See 1 Powell on Mort. 116–22; *Clark & Davis* v. *Henry*, 1 Cow. 324; 2 Story, 287, sec. 1019.

3. Parol evidence is in some cases admissible to prove a deed was executed as a mortgage, notwithstanding the statute of frauds. *Gibson* v. *Seymour & Hall*, *Williams* v. *Parish*, 4 Vt. R. 522; 2 Story, 287, §1018; *Marsh* v. *Pell*, 1 J. C. R. 594; *Strong* v. *Stewart*, 4 J. C. R. 167; *Washburn* v. *Merrill*, 1 Day, 139, referred to in 1 Powell on Mort. 120, n. 2; *Maxwell* v. *Montacute*, Pr. Ch. 326; *Young* v. *Peachy*, 2 Atk. 258; *Walker* v. *Walker*, 2 Atk. 99, referred to in Powell on Mort. 119, n. l.; 2 Story's Eq. 77, §768; 1 Powell on Mort. 150; see also *Card* v. *Jaffray*, 2 Sch. & Lef. 374; and *Barney* v. *Currier*, 1 D. Chip. R. 315.

4. *Lapse* of time—*when it bars*. From the date of the deed from Granger to Miles, to the service of the bill, is ten years, three months, and twenty-two days, and from the time it was deeded to the Kinastons, eight years, two months and eight days. This was caused by the *fraud* of Miles and the Kinastons in concealing from the orator that Miles, when he took his deed, had a full knowledge that Granger had only a mortgage title and that the orator had an equity of redemption. Without evidence of this fact he could not proceed, and, as appears by Conner's affidavit on petition for rehearing, he brought his bill within less than one year after discovering testimony on this point. No length of time is a bar to redemption where there is fraud, or where, by agreement at the time of the transaction, the mortgagee is to enter and keep possession until he is paid out of the profits. *Marks* v. *Pell*, 1 J. C. R. 584; Am. Ch. Dig. 354.

In case of *fraud*, time, in order to bar the remedy, will not begin to run until the party acquires a knowledge of the facts constituting the fraud. B. & B. 129; 1 Powell on Mort. 364, 365; *Arden* v. *Gregory*, 2 Eden, 295; 2 Barb. & Harr. 310, §89.

5. *Effect of sale by mortgagee.* A mortgagee in possession is trustee of the mortgagor, and if any one purchases, with notice, from the mortgagee, the purchaser becomes trustee

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of the mortgagor. Such sale by the mortgagee does not affect the right of the mortgagor to redeem. 2 Barb. & Harr. Eq. Dig. 267, c. 16, 312, c. 28, 29; 2 Cowen, 238; *Wilson* v. *Throop*, 2 Cow. 203; *Aymor* v. *Hill*, 5 J. C. R. 570.

6. *Effect of purchasing with notice.*—See Story's 1st. Com. on Eq. 383, §395–6; 2 Story, 93, §784; 96, §788, 89. "The purchaser with notice is bound to the same extent and in the same manner as the person was of whom he purchased." Sugden's 5th Letter to a Man of Property, page 42, Vol. 1 Law Library. See, also, *Powell* v. *Delton*, 2 B. & B. 415; *Taylor* v. *Stebbins*, 2 Ves. jr. 440; *Waymouth* v. *Boyce*, 1 Ves. jr. 425; *Smith* v. *Law*, 1 Atk. 490; 1 Vernon, 363; *Mead* v. *Lord Orrery*, 3 Atk. 238; *Eyre* v. *Dolphin*, 2 B. & B. 290; Chitty's Eq. Dig. 718.

This case is not one where priority of record comes in question; but it belongs to that class of cases where the purchaser purchases with notice that there was an incumbrance upon the estate when he purchased it.

The registry acts of England, Ireland, New-York and Vermont, are materially different; and, consequently, *Bushell* v. *Bushell*, 1 Sch. & Lef. 96; *Hine* v. *Dodd*, 2 Atk. 275; *Holland* v. *Stainbridge*, 3 Ves. jr. 478; *Day* v. *Dunham*, 2 J. C. R. 190; and *Foster* v. *Beekman*, cannot be relied on as law applicable to this case. As to what is notice, in Vermont, see *Ludlow* v. *Gill*, 1 D. Chip. R. 49; *Barney* v. *Currier et al.*, 1 D. Chip. R. 3–15; *Rublee* v. *Mead*, 2 Vert. R. 544; and *Baxter* v. *Mark & Luke Goss*, decided at the last term of this court in Caledonia county.

The plaintiff having shown that the title which he parted with was a mere mortgage, and that, *prima facie*, he has a right to redeem, the defendant, to protect himself, must show a better title, or redemption will be decreed. He must show his grantor in possession at the time he took his deed; that he paid a valuable consideration for the land, and paid for it without notice of the orator's claim. The burthen is on defendant to show this, and not on the orator. If the defendant, in his answer, does not show all the requisites of a better title, it would *seem* that the orator is not called upon to show any thing about the defendant's title. Ch. J. Kent says, if a purchaser wishes to rest his claim on the fact of being an innocent, *bona fide* purchaser, he must positively deny notice,

even though it be not charged. *Deming* v. *Smith*, 3 J. C. R. 344, and English decisions there referred to. See also, 2 Powell on Mort. 552, in text, and n. i.

As to what the defendant must aver to show a better title, see Mit. 222. That he was a *bona fide* purchaser without notice is mere matter of defence. *Gulatain* v. *Erwick*, 1 Hopkin's R. 55. This *averment*, Miles, or either of the Kinastons, might have made in his answer, and whether *true* or *false* would depend on proof. But if no such *averment*, (as such,) is made, the court will presume that there were not facts to warrant it. But the court will not say that a defendant is an innocent purchaser without notice, when the defendant does not say so himself. If the defendant was not an innocent purchaser himself, but purchased of a person who was, then he may clothe himself with the *honesty* of his grantor by avering in his answer the same facts to make out a better title in his grantor than the plaintiff. *That* the law would have required the grantor to aver, had the plaintiff brought a suit against him, before he conveyed to the defendant. *Banfer* v. *Platner*, 1 J. C. R. 213; see 2 Powell on Mort. 635–7; 1 Hopk. R. 5; 8 Cowen, 361.

Miles' answer admits that he purchased *with notice* that Chase deeded to Granger for security merely, as charged in the bill. He is therefore bound to the same extent, and in the same manner, as Granger of whom he purchased. Story's Com. on Eq. 383, §395; 2 Story, 93, §784; 96, §788–9. Sugden's Letter, 1 Law Library, 42, before cited. Connor had the same right to redeem the property in the hands of Miles as in the hands of Granger,—Miles having purchased with notice. That Miles gave a consideration does not alter the case. 1 Vernon, 363; 3 Atk. 238.

The answer of *Joseph G. Kinaston*, that although he had heard that said land and mills had been put into Granger's hands as security, &c., yet that he did not suppose that Conner could compel either Chase or Granger to redeed to him, unless so disposed, as the deeds were absolute on the face, &c., amounts to an admission of notice on his part, and if he has mistaken the law, his ignorance cannot shield him. The maxim *Ignorantia juris non excusat* is respected in equity as well as at law. 1 Story's Eq. 121, §111 to 115; Jeremy's Eq. Jurisd. 366; 1 Mad. 60.

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The evidence shows the rest of the defendants to have had notice of Conner's claim at the time of the execution of their several deeds, and the law which applies to Chase, Miles and Joseph, has the same application to them.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This cause has been elaborately argued at this term and at two previous terms. It would have been decided at the last argument but that the members of the court who heard it, immediately separated and had not the opportunity for consultation which was desired. At every argument the court, or at least a majority of them, have been agreed in the result to which we have now arrived, and in this result the court, are at this time, unanimous. It appears that in the year 1823, the orator purchased a tract of land of about five acres, in Sheffield, on which was a saw-mill privilege. On the 22d day of January, 1824, he conveyed the same by deed of warranty, absolute on its face, to John Chase. John Chase, on the 2d day of May, same year, 1824, by a like deed of warranty, conveyed the same premises to Elihu Granger. Granger, on the 8th of November, 1825, by a similar deed of warranty, conveyed to Martin M. Miles, and Miles, on the 8th November, 1828, by a like deed, conveyed to Isaac and Joseph G. Kinaston, two of the defendants; and in 1830, Isaac Kinaston, deeded one fourth of the mill to Jesse G. Kinaston, another of the defendants. The object of this bill is to prove that the conveyance from Conner to Chase, in 1824, was intended only as a mortgage to secure Chase for what Conner then was, or might be, indebted to him, and that when Chase conveyed to Granger, is was understood between Conner and Granger, that Granger should hold the same, only as security for what Conner might be owing him; that Miles and the Kinastons had knowledge that such was the nature of those conveyances; and the prayer is that the defendants may be treated as as mortgagees, account for the rents and profits, and that the orator may be at liberty to redeem the premises. It is to be observed that the several deeds before-mentioned were recorded in the town clerk's office, and the several grantees entered into and remained in the actual possession during the time they owned the same.

To entitle the orator to the relief prayed for, the court are called on to decide that a deed conveying, or purporting to convey an estate unconditionally, may nevertheless, be proved by parol evidence, to be a conveyance of an estate upon condition, or, in other words, a mortgage, subject to all the incidents of a mortgage; and that this character shall attach to it, notwithstanding the estate has passed to several successive grantees, and possession followed the deeds, if, by parol evidence, it can be proved that these grantees have either knowledge or notice of the claim on the part of the first grantor to be considered as a mortgagor. The court are of opinion that neither the principles of law or equity, or the facts proved in the case, would warrant them in granting the orator the relief prayed for.

In the first place, it would be an obvious perversion of the well established rule of evidence that the intent of the parties as expressed by their writings, cannot be controlled by parol evidence, as well as a direct infringement of the statute of frauds.

In the second place, if the deed from the orator to Chase could have been treated as a mortgage between them, at the time it was executed, it would not have that character as to subsequent purchasers under Chase, nor would they be affected by any agreement between the orator and Chase, or between the orator and Granger, unless the purchasers had full knowledge of the character and nature of the contract and agreement between the parties, and purchased fraudulently, and with the intent thereby to defeat the right of the grantor, the orator in this bill. Under our recording system, a purchaser of one who has the legal title and possession, *is not* to be affected by the disputes and claims between the legal owner and the claimant in equity, when no suit is pending between them. The proof of the equitable claim rests wholly in parol, to be proved *alone* by the testimony of witnesses, and the purchaser has no fraudulent intent to defeat the equitable claim.

In the third place, the length of time in which these defendants, and those under whom they claim, have had the premises in question as absolute owners, not recognizing any rights in the orator,—for it seems by the testimony of one witness, that in May or June, 1824, Granger forbade this orator from going into the mill or removing any thing out of

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it,—affords a strong presumption either that the orator never had any equitable claim, such as he now asserts, or that it was abandoned; and requires of this court to leave him to assert whatever claim he may have, as a personal claim against Granger. The rights of these parties are not reciprocal on the principles contended for by the orator, as the defendants, Kinastons, cannot be considered as the assignees of a mortgage, or as having any debt against the orator, Conner, which they can enforce at law or in equity.

In the fourth place, as the answer denies that either the deed to Chase, or from Chase to Granger, was subject to any condition or trust, the orator, if entitled to any relief, would be under the necessity of proving not only the trust, but notice of the trust in every one in the chain of title. A grantee of an absolute title may sell to one having notice, and the latter will hold the estate free from the trust. There is no sufficient evidence of any such knowledge in Martin M. Miles, except the answer of Miles, and this is no evidence against the present holders of the estate.

That the introduction of parol testimony, of the nature of that relied on in the case, to show that either the deed to Chase, or from Chase to Granger, was not absolute, but defeasible, would contravene the rule of law, in relation to the effect of deeds and writings, as well as militate with the provisions of the statute of frauds, appears to me very clear. The case itself and the testimony, admonish us of the danger of making any further inroads on the rule of law as well as on the statute, and shows the uncertain and unsatisfactory tenure by which real estate is held, if it is liable to be changed, altered or destroyed by the slipping memory of witnesses, or through the mistakes or falsehoods of men on whom no reliance was placed by the parties, to remember or retain the evidence of their agreement, contract or understanding. The proposition that parol evidence is admissible to show that an absolute deed was intended only as a mortgage, has been laid down too loosely and unguardedly by elementary writers; and learned judges have sometimes, rather incautiously, stated the proposition, without guarding it from misconceptions and misconstructions, by shewing in what cases it does, and in what cases it does not obtain; and the extreme length to which this doctrine has been carried in the state of

New-York has inclined one of their learned judges to dissent entirely from the doctrine, 21 Wen. 36, and another, to speak of it as "latitudinary," 3 Cowen & Hill's notes, 1433. Out of that state the proposition has not met with much favor. Where, through fraud, accident, or mistake, a deed or any written instrument is made differently from what the parties meant to make it, or where a deed is executed and the other party refuses to execute a defeasance, such being the contract between the parties, a court of equity will afford the requisite relief, either by reforming the instrument or setting it aside, as the case may require; and a resort to parol proof may be had to discover the fraud, accident, or mistake. Where an absolute conveyance has been made, and the party admits in his answer, that a security only was intended, or where the grantee has, *in writing*, on the deed, admitted it to be for security, or where, by other writing, he has made the same admissions, courts of equity have treated it accordingly. These decisions, however, have proceeded wholly on the ground that, through mistake or fraud, the deeds were made to express an intent different from what the grantor really did intend, or that the evidence was sufficient under the statute. But where a man gives an absolute deed, and there is no fraud in obtaining it, and no agreement in relation to executing a defeasance, nor any writing between the parties, and no admission in an answer in chancery, and they have conducted as though an absolute sale was intended, I cannot think parol evidence admissible to show such a deed a mortgage, in order to give the grantor a right of redemption. The leading case upon this subject, and on which the opinion of the elementary writers, and the *dictum* of some judges, has been founded, as warranting the admission of parol proof in such a case, is *Montacute* v. *Maxwell*, reported in Pere Williams, 618; 1 Strange, 236; 1 Eq. Cases Abr. 19 pl. 4–5; 2 Eq. Ca. Abr. 592, pl. 6. The case itself was a bill brought by a wife to compel the defendant, her husband, to execute an agreement made before the marriage, in relation to her separate estate. The statute of frauds was pleaded to the bill, and was allowed at the first hearing—Lord Chancellor Parker observing, "that where there is no 'fraud, only relying on the honor, word, or promise of the 'defendant, the statute making these promises void, equity

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'will not interfere." The bill was amended, setting forth other facts, and also setting forth a letter of the defendant; and this letter the chancellor considered as taking the case out of the statute, and ordered the plea to stand for an answer. The case itself affords no authority for admitting parol evidence, to show an absolute deed intended as a mortgage, but the reverse. In deciding the case, however, the Lord Chancellor is reported to have said, probably as illustrating his views in that case, that when a man treated to lend money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the conveyance he refused to execute the defeasance, yet Lord Nottingham decreed it against him *on the fraud*. So when an absolute conveyance is made, for £100, to A., and instead of entering and receiving the profits, A. demands interest for the money and has it paid to him, this will be admitted to explain the nature of the conveyance. To these *dicta* no possible objection can be made. It presented a case of direct fraud, where the deed was fraudulently obtained and the testimony in relation to receiving interest, was admissible, with other competent testimony, to explain the nature of the transaction. In the cases of *Walker* v. *Walker*, 2 Atk. 99; *Young* v. *Peachy*, 2 Atk. 257; *Joyner* v. *Strafan*, 3 Atk. 389; *Dickson* v. *Parker*, 2 Vesey, 225, no point either arose in the case, or was decided in relation to a mortgage; but the chancellor, in each of those case, referring to the case of *Montacute* v. *Maxwell*, recognizes and reiterates the principle, that when the agreement between the parties was, that a mortgage should be executed by a deed and defeasance, and the deed is executed, and the party fraudulently refuses to execute a deed of defeasance, or, taking advantage of the ignorance of the mortgagor, omits to insert a clause of redemption, the court, in the exercise of their acknowledged and undisputed power to relieve against fraud, correct mistakes, and make written instruments conform to the intent of the parties, as they should have been made in the first place, will inquire into the transaction, and grant such relief as may be necessary. In the case *Cottrill* v. *Purchase*, Talbot's Ca. 60, the question arose principally upon the construction of a deed. The first deed between the parties had been exe-

cuted, and admitted to be a mortgage, I should think probably by a deed and defeasance, as it is said *those deeds* were cancelled, and the Lord Chancellor expresses himself decidedly against that mode of making a mortgage. The deeds first executed were cancelled, and, some time after, another deed, in consideration of a further sum, was executed, which was absolute, but with a covenant in it which, it appears to me, showed very clearly that an absolute purchase was not intended. The master of the rolls was, however, of opinion, from the evidence, that an absolute purchase was intended, and dismissed the bill brought for redemption; and the chancellor affirmed his decree. I do not find in this case, any authority to extend the principle of admitting parol testimony in the case of a mortgage, further than it was admitted in the case of *Montacute* v. *Maxwell*, before mentioned. On the authority of these cases, *and on the admissions in the answer of the defendants*, Chancellor Kent, in the case of *Strong* v. *Stewart*, 1 Johns. Ch. R. 167, admitted a party to redeem, although the conveyance was absolute in its terms. But in the case of *Marks* v. *Pell*, 1 Johns. Ch. R. 594, the same learned chancellor, while he admits that it is competent to show by parol proof, that a deed was taken as a mortgage, and that the defeasance was destroyed by fraud or mistake, refused to decree a redemption when the grantee was in possession, on proof of the confessions of the party, observing that the acknowledgments of the party as to title to real property, are generally a dangerous species of evidence, as it would counteract the beneficial purpose of the statute of frauds. In the case of *Day* v. *Dunham*, found in 2 Johns. Ch. R. 182, and 15 Johns. R. 555, this question was in no way involved. A *defeasance was executed subsequently to the deed*, but was unrecorded; the point on which the court of errors and court of chancery differed, was whether the notice contained in the record of the absolute deed should be considered as a notice of the mortgage under the registry act of New York. I do not perceive in the subsequent cases of *James* v. *Johnson*, 6 Johns. Ch. R. 417, or *Henry* v. *Davis*, 7 Johns. Ch. R. 40, that, in the absence of any fraud, and without any proof in writing, and without any admission in an answer, a court of chancery would decree an absolute deed a mortgage, and let the grantees in to redeem, merely on

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parol proof that such was the intention of the parties. That subsequent decisions in New York have extended the principle much further, I have already noticed, but Nelson, J., in *Patchin* v. *Pease*, 12 Wendell, 61, 64, thought that parol proof in such a case, was proper only in case where there was fraud in the grantee.

In this state, in the case of *Williams & Putnam* v. *Parish*, decided in Orange county, it was decided, that when security was given by a deed absolute, if there was no ground to impute actual fraud, such conveyance might be good. Yet in the case *Gibson* v. *Seymour*, 3 Vt. R. 565, they considered taking security in that way strong evidence of fraud. In the case of *Wright* v. *Bates et al.*, 13 Vt. R. 341, my decision as chancellor, and afterwards in this court where the cause came by appeal, was founded entirely on the belief that the writing executed by Bates, and the fact of Wright remaining in possessession, paying *interest* instead of rent, was sufficient evidence to show that the parties stood as mortgagor and mortgagee, that the contract was not, as contended for by the defendants, a conditional contract of sale. The case of *Campbell* v. *Worthington*, 6 Vt. R. 448, was decided on the construction of the contract between Campbell and the testator Watrous.

In the present case, the solicitor who framed the bill appears to have been fully aware of the principle of law in relation to this subject, as recognized in the court of chancery in Great Britain, and has drawn his bill with a view of bringing his case within these principles. He charges that Chase agreed to give him a *written* defeasance, and also that Granger agreed to give a written defeasance. It is sufficient to say there is no proof to establish that fact, either against them or against the Kinastons, except the answer of Chase. This answer, though artfully drawn, and evidently intended to affect the other defendants, is no evidence against them, as he has long since ceased to have any interest in the land, and no admissions by him, Granger or Miles, can affect any others but themselves. I apprehend, therefore, that the testimony, in this case, of the statements made by persons in the presence of witnesses, attended with the uncertainty whether the witnesses heard or recollect, or can now detail, the expressions made use of, is wholly inadmissible to change the character of the conveyance made by the orator to Chase, or

by Chase to Granger; and although the court might rest satisfied in saying that the proof is not sufficient to establish the fact which the orator wished to establish, yet I deemed it proper to investigate the principle on which the orator relies, that from our omission to say any thing on the subject it might not be considered as the doctrine of the court, that a party who has conveyed land or other property by an absolute deed, is at liberty to come into a court of equity and, by proof of confessions, declarations and admissions of the other party, and that kind of hearsay and unsatisfactory evidence, claim to be treated as a mortgagor, and call his grantee to account for rents and profits.

But if the law on this point were otherwise, and Conner, the orator, could claim, as against either Chase or Granger, to be considered as a mortgagor, he would have no such claim against either Miles or the Kinastons. Granger had both the legal title and possession, and could transfer both to a purchaser. Conner's claim was only on a parol contract. It is the object of our recording system that the titles to real estate should appear on record, and a person desirous of purchasing, finding from the records that the person, in whom the apparent title is, has the actual possession, ought not to be affected by any disputes between the owner and any third person, or any equitable claims between them, unless he purchases intending to defeat those equitable claims; otherwise there could be no valid sale or transfer, until one or the other should think proper to settle their disputes by a judicial determination. The rule laid down by the master of the rolls in *Tolland* v. *Stainbridge*, 3 Vesey, Jr., 478, is, that in order to let in a prior deed unrecorded against a subsequent deed recorded, the person who registers the subsequent deed must have known the situation of the persons having the prior deed, and knowing that, registered in order to defraud them of that title which he knew at the time was in them. This was in accordance with the principle previously laid down by Lord Hardwick, in *Hine* v. *Dodd*, 2 Atk. 275; and this rule will apply to the present case, where it is not insisted that the defendants had any notice of a prior, unrecorded deed, or purchased of one not having the legal title, but only that they had notice of a parol agreement or contract.

The court discover no evidence of any fraudulent intent

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to deprive the orator of any legal or equitable right in either Miles or the Kinastons. It is said they had such notice as should have put them on inquiry in relation to the estate of Conner; and it is undoubtedly true, as a general principle, that when a man has sufficient information to lead him to a fact, he should be deemed conusant of it. If the purchasers had pursued the inquiry, and had had access to all the testimony which has been afforded us in this case, unless they were more fortunate than I have been, they would have been at a loss to discover what was the real understanding and agreement between Granger and Conner,—whether it was in relation to a sale by Granger to Conner on certain terms, or whether it was to give Conner a right of redemption, for we learn that they disagreed as to the terms of it in 1824, and ever after that time, Granger repudiated any claim of Conner, and forbade him from having any thing to do with it. There was nothing therefore, to put the defendant, Miles, or the Kinastons, on inquiry, nor is there satisfactory evidence that Conner then had any right in the mill, and there is no evidence that the defendants purchased with any intent to defraud him of any right he pretended to have; and, moreover, if they had full knowledge of all that is here pretended by the orator, they might safely purchase, according to the principle declared in *Cordwell* v. *Mackerell*, Amb. 515, as it was not a claim which they were bound to notice.

In the third place, the claim of the orator is evidently a stale claim, whatever right he had under any contract, existed as early as the spring of 1824, for at that time, Granger set him at defiance and forbid his going into the mill. This bill was not brought until nearly twelve years from that time. All remedy at law on his debt or contract against Granger, if he had any, was barred by the statute of limitations, and although a sufficient time has not elapsed to bar an undoubted right of redemption, yet this period of time affords very strong evidence against the claim now set up by the orator. Granger, it is stated in the bill, has now gone out of the country. A very different complexion might have been given to this transaction, if a suit, either at law or in equity, had been instituted while Granger was in the country. Length of time short of the period in which a redemption is barred, was much relied on in the case of *Cotterell* v. *Purchase*, by Lord

Chancellor Talbot, to refuse the application of the plaintiff for a redemption. Whether any thing is or was due from Conner to Granger; whether the mill was or was not more than a compensation to Granger, for what was due him from Conner, and whether it was intended as a compensation, can only be ascertained in a suit between them. Granger assigned no claim against Conner to Miles. It would be highly inequitable to permit this subject, at this distance of time, to be litigated and inquired into, in a suit in equity between Conner and the Kinastons.

I have remarked that there is no evidence that Miles had any knowledge of any equitable claim of Conner, except his answer, and that this was no evidence against the present holders of the estate. It is undoubtedly true that, if Miles had no notice of any equitable claim to the estate he purchased of Granger, the estate was vested in him, and he might sell to the Kinastons and convey a good title to them, notwithstanding they had notice of the orator's claim. Hence it becomes necessary to prove this knowledge in Miles. Miles was not examined as a witness, but this orator relies on his answer which, like that of Chase, is very artfully drawn, and, intended to affect others besides himself, is hardly deserving to be treated as an answer in chancery—and relies on the authority of the case, *Walley* v. *Walley*, 1 Vern. 484. There is however, a very material distinction between the cases. The defendants deny any trust in Miles, or any knowledge, either in themselves or Miles, that Granger held the land by way of security, trust or mortgage. If a trust had been proved by legitimate testimony, and it had also been proved that the Kinastons had full notice of the trust in Granger, and they relied wholly on the want of notice of the trust in Miles, some of the remarks made in the case of *Walley* v *Walley* might have been applicable. Though it is to be remarked that it was expressly decided in that case, that the answer of ————, one of the defendants, could not be read in evidence against the other defendant, the decision in the case will not warrant the position that the answer of Miles can be evidence in this case, that the estate received by him of Granger and conveyed to the Kinastons was encumbered by any trust, and the answer does not disclose any such notice as would affect his title from Granger or that of

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his grantees. This point however, is comparatively unimportant in the decision of this case.

In every point of view in which we consider this case, we think that neither the law nor the evidence show any ground of equity in the orator against the Kinastons. The decree of the chancellor, so far as it dismissed them with their costs, is affirmed.

MATTERS OF PRACTICE.

CHITTENDEN COUNTY.

January Term, 1843.

William P. Briggs *et al. v.* Henry Shaw *et al.*

On an appeal from chancery, the supreme court will not send an issue of fact to the county court to be tried by a jury.

This case was an appeal from a decree of the chancellor of the third circuit. A motion was interposed by the orator, for this court to order the issue of fact in the case to be sent to the county court to be tried by the jury.

By the Court. — This court have now no chancery powers whatever, strictly speaking. In hearing this appeal we sit as a court of error merely, to examine into errors both of fact and of law, but not to re-examine any matter resting in the discretion of the chancellor. The sending an issue to be tried by the jury, is a matter of that character purely; and, although common, both in England, and in many of these states, has not, to our knowledge, been practiced in this state. Motion overruled.

William R. Lane *v.* Leander Marshall *et al.*

The supreme court will not send a cause back to the chancellor, or continue it, on account of the pendency of a bill of review.

There was a motion interposed before the hearing in the present case, to send the whole cause to the chancellor, or else continue the hearing in the case until after the determination of a bill of review pending in the court of chancery in the case.

By the Court. — We have no authority to send this cause back to the chancellor for any such purpose. And there

FRANKLIN, January, 1843.

does not appear to be any cause to delay the hearing of the appeal, in this court, on account of the pendency of the bill of review. The matters are wholly distinct, and this case must, in any event, go back to the court of chancery to carry into effect the final decree, and then the whole matter will be under the control of the chancellor.

FRANKLIN COUNTY.

JANUARY TERM, 1843.

MASON PETERS *v.* JOSEPH D. FARNSWORTH.

Where exceptions were taken by the defendant, involving the right of recovery, and by the plaintiff as to the rule of damages, it was decided that the defendant was entitled to open the argument and to reply.

IN this case exceptions were taken by both parties, — the defendant's exceptions going to the right of recovery, and the plaintiff's to the rule of damages adopted in the county court. A question was made in regard to which party had the right to open the argument.

BY THE COURT. — In the present case the defendant is entitled to open the argument on his own exceptions, and to a general reply.

CORDELIA MANDIGO *v.* PHILIP MANDIGO.

In order to the granting of a bill of divorce under the clause of the statute authorizing a divorce when the husband grossly, wantonly, and cruelly refuses or neglects to provide a maintenance for the wife, being of sufficient ability, something more must be shown than a mere wilful desertion and refusal of support.

THIS was a petition for a divorce from the bonds of matrimony on the part of the wife, on the ground of the husband, "being of sufficient ability to provide suitable maintenance for her, having, without cause, grossly, and wantonly, and cruelly refused and neglected so to do."

The proof in the case, in the opinion of the court, presented an ordinary case of wilful desertion. In denying the bill, the court so remarked, and further intimated, in the present, as it did in some other cases arising under the same stat-

ute, in the course of this circuit, that, in order to grant a bill for the cause here alleged, something more must be shown than a wilful desertion of the wife by the husband, although he were of ample ability to maintain her, and refused her any aid in that respect. The terms, "grossly, wantonly, and cruelly," &c., although not very definite, must not be considered wholly insignificant. The legislature did intend a new cause of divorce, and the court could not regard it as synonymous with that of wilful desertion, where *three* years are required, and here only *one* year.

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WINDSOR COUNTY.

FEBRUARY TERM, 1843.

STEPHEN CUMMINGS *v.* SEWALL FULLAM.

A party will be entitled to the usual time, under the rule, for filing exceptions to a report of auditors, after a motion to recommit the report has been disposed of.

IN this case, which was a report of auditors in an action of book account *referred in this court*, the party, against whom the report was made, moved to recommit the same to the auditors, which motion, on hearing, was overruled. The court held the party still entitled to the usual time, under the rule, for filing exceptions, after the motion to recommit was disposed of, upon the double ground, that, until that time it could not be known that the party would be driven to his exceptions, and, also, that by filing exceptions, he virtually waived his motion to recommit. Such, the court remarked, is the rule in chancery, in New York, in regard to exceptions to the report of the master, and we think it the most convenient rule in practice.

JOHN STIMPSON *v.* JACOB A. CUMMINGS.

Exceptions may be entered in the supreme court, although a term of that court may have intervened after the taking of the exceptions, in a case where a motion for a new trial is pending, until after such intervening term.

THE verdict in this case, in the county court, was found

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November term, 1840, but the case was not entered in this court until February term, 1842.

The party, in whose favor the judgment below was rendered, now moved to dismiss the exceptions, on the ground that the case should have been entered in this court at the next term after the exceptions were taken in the county court. It appeared, by referring to the docket entries, that there had been pending in the county court a motion for a new trial until the May term, 1841.

BY THE COURT. — This was a sufficient reason for not bringing the exceptions into this court. They could not have been entertained here, until the motion for a new trial had been disposed of in the county court.

Heirs of LYDIA BRIGHAM *v.* The Executors of the same.

The general rule that the party prevailing is entitled to costs, is applicable to the case of an appeal, by executors, from a decree of the probate court disallowing a will.

THIS was the case of an appeal, by the executors, from the decree of the probate court, disallowing a will. The will was established in the county court, and their judgment affirmed here. A question was made in regard to costs in the case.

BY THE COURT. — By chap. 44, § 33, of the Revised Statutes, the allowance and taxation of costs would seem to be, to some extent, discretionary with the court wherein appeals from the probate court are finally disposed of. But this discretion is not to be understood as an *arbitrary* discretion, to be exercised in each particular case, according to its peculiar circumstances, and the conduct of the parties; but is a *legal* discretion, to be exercised according to some *general rules*. We know no better rule, in regard to costs, than that the party prevailing should recover taxable costs, where he has not been in fault.

Taxable costs allowed to the appellants.

AN INDEX

OF

THE PRINCIPAL MATTERS

COMPRISED IN THIS VOLUME.

A

ABSCONDING DEBTOR.

1. An affidavit of a creditor that his debtor is about to *leave* the state, is not sufficient to warrant the issuing of an attachment against the body of the debtor, under the act exempting the body from imprisonment, in actions founded on contracts made after the first day of January, 1839. *Aiken* v. *Richardson*, 500
2. A writ of attachment against the body, issued without the required affidavit, is void, and an arrest under it, illegal. *Id.*
3. Acquiescence of the debtor in such arrest, gives the plaintiff no right as against the bail, who may take advantage of the defect, by plea, in an action against him. *Id.*

ACCOUNT.

1. An account rendered and acquiesced in for a considerable time, will be conclusive upon the parties, the same as an account stated. *Tharp* v. *Tharp*, 105
2. In an action of account under the statute, the declaration should set forth, distinctly, all the grounds upon which the plaintiff claims to hold defendant to an accounting. *Genesco* v. *Miller*, 152
3. Under a contract for cultivating a farm and dividing the produce and profits, the expense of keeping a team and of providing tools and seed may be recovered in an action of account against defendant as bailiff and receiver, under our statute. *Id.*
4. A party cannot be compelled to account as bailiff and receiver, under a contract for joint occupancy of land and division of its profits, until the expiration of the time specified in the contract for such occupancy. *Id.*

APPEAL.

When the principal of a note, together with the interest, exceeds twenty dollars, the right of appeal from a judgment of a justice, thereon, is not taken away by statute. *Smith* v. *Smith*, 620

ASSIGNMENT.

1. A book debt may be assigned by mere words, without writing. *Spafford* v. *Page*, 490
2. If, after such assignment, a creditor of the assignor bring a trustee process, wherein he obtains judgment against the debtor, as trustee, and the assignee have notice of these proceedings, he will not, after that, be permitted to recover the debt by a suit in the name of the assignor, even where he had given notice to the debtor of his claim to the demand, before the service of the trustee process. *Id.*

3. *Quere*—Whether, at law, the assignee can recover upon the claim, after the debtor has been adjudged trustee by a court of competent jurisdiction, even where he had no notice of the trustee process. *Id.*

See PERSONAL PROPERTY, 2.
" LESSOR and LESSEE.

ASSUMPSIT.

A stove was sold for a given sum, payable in cattle or grain, at a future day. *Held*, that, after a breach of the contract, a recovery might be had upon a general count for goods sold and delivered. *R. & J. Wainwright* v. *Straw & Cunningham*, 215

ATTACHMENT.

See PERSONAL PROPERTY, 1.

ATTORNEY.

1. The power of an attorney is confined to the prosecution of a suit and the incidents properly connected therewith; and does not extend to the compromising and discharging of his client's cause of action, without receiving his full claim. *H. & G. Vail* v. *Adm'r of Jackson*, 314
2. The attorney of record of the plaintiff may, when the plaintiff lives at a distance, give such instruction to an officer as he thinks the interest of the client requires; and his directions to the officer, when he gives him an execution, in what manner to execute the same, will bind his client. *Kimball & Co.* v. *Perry*, 414
3. The attorney has a lien upon an award of arbitrators, where a pending suit is referred, to the full extent of all his just claims as attorney in the suit. *Hutchinson & Buchanan* v. *Howard et al.* 544
4. This lien cannot be defeated by attachment, under the trustee process. *Id.*
5. *Dictum*—It seems well settled that the attorney has a general lien upon all papers in his possession, and all sums equitably due thereon, for any balance due him upon other matters, as well as in the particular suit. *Id.*

See EVIDENCE, 1, 2.

AUDITOR.

1. It is the duty of an auditor to report facts, and all inferences of fact; and the court, in deciding on his report, are to determine only questions of law. *Stoddard* v. *Chapin*, 443
2. An auditor may not report the evidence merely, and leave it for the court to investigate the same, and come to conclusions as to what is proved. *Id.*

See ERROR, 1.

AUDITA QUERELA.

The judgment of a justice court, rendered after the suit has been discontinued by the failure of the parties to attend on the day appointed for the holding of the court, will be set aside by *audita querela*. *Pike* v. *Hill*, 183

AWARD.

1. O. and W. having a claim against R. for money received, to their use, and R. alleging that he had paid it to O., they submitted the matter to arbitrators with authority to award costs and damages, who awarded that R. account to O. for a certain sum, in damages and costs. In a suit on the award in favor of O., it was held that there was no mutuality in the submission between O. and R., and, that neither the rights, nor liabilities, of either, were affected by the award. Held, also, that the submission and award, though legally invalid, might be given in evidence under a declaration setting forth the above facts. *Onion* v. *Robinson*, 510
2. In the case of a written submission to three, and, in case one of them could not be procured to a fourth—*held*, that an award made by the four, in pursuance of an agreement of parties, on the day of trial, was good. *Blanchard* v. *Murray*, 548
3. In a declaration on an award, it is not necessary to set forth the whole award. *Id.*
4. An action of ejectment, and a controversy in relation to the seizin and possession of land, may be submitted to arbitrators. *Id.*
5. After a verdict, for plaintiff, in an action upon an award, embracing the fees of the arbitrators, judgment will not be arrested because the declaration does not contain an averment that the plaintiff has paid the arbitrators' fees. *Id.*

B

BASTARDY.

1. An illegitimate child, living in a town with its mother, until four years of age, did not, under the act of 1801, gain a settlement by residence, though not warned out. *Manchester* v. *Springfield*, 385
2. Where the overseers of a town had assumed the control of a prosecution for bastardy, it was held they were competent witnesses--the objection arising from their corporate interest being removed by statute. *Spears* v. *Forrest*, 435
3. A complaint for bastardy need not have a minute, by the magistrate, of "the true day, month and year" it was exhibited to him. *Id.*

BOOK ACCOUNT.

1. Where money is advanced to the defendant, under an expectation that it will be paid in transportation, thereafter to be done, and to be adjusted upon the defendant's rendering his account, it furnishes a substantive ground of recovery in the book action, if not paid as the parties contemplated. *Hickok & Catlin* v. *Ridley*, 42
2. R. and R. made a contract with M. and K. to deliver them palm leaf to be manufactured into hats of a particular description, which they were to receive at a certain sum per dozen: *Held*, that it was proper for R. and R. to charge on book, the palm-leaf when delivered, together with cash advanced; and that on the neglect or refusal of M. and K. to perform the contract, a recovery might be had against them, for the palm-leaf and cash, in an action on book. *Held*, also, that R. & R. were not obliged to receive a less number of hats than were stipulated in the contract, nor to select out of a large number, sufficient. at the stipulated price, to pay for the cash and palm-leaf delivered. *J. & J. Rogers* v. *Miller & Kathan*, 431
3. A charge of money overpaid on a note, by mistake, cannot, without giving previous notice of the overpayment, be recovered in an action on book, when the mistake was not the defendant's, and he did not, in any way, induce it. *Stoddard* v. *Chapin*, 443
4. A balance found due on settlement, may be charged over in a new account, and where the settlement is not impeached, may be recovered in a book action. *Spear* v. *Peck*, 566
5. In the case of a contract to deliver certain furnace castings, to a certain amount, upon a credit of a year, it was held, that a refusal to receive a load of the castings, put an end to the contract, as to the obligation both to deliver the balance, and to give the stipulated credit for the amount delivered; and that an action of book account might be sustained immediately, for the quantity delivered. *Tyson* v. *Doe*, 571
6. T. and D. made a contract, by which T. was to furnish plough irons and D. was to wood them, and return half the ploughs. D. set aisde, under the contract, twelve ploughs, as the property of T., six of which were subsequently attached and sold on execution as D.'s property. *Held*, that T. could not maintain an action of book account against D. to recover their value. *Id.*

C

CHANCERY.

1. Chancery will not relieve against a judgment at law, when the matter set up, would have been a good defence, and would have been established by the same evidence at law, and when the orator has suffered a judgment to pass without attempting to avail himself of such defence. *Briggs and Edmonds* v. *Shaw and Thrall*, 78
2. A court of chancery will not interfere by injunction, to prevent a mere trespass, when the impending injury is remediable by the recovery of damages at law. *Smith* v. *Pettingill et al.* 82
3. Injuries to timber, ore, monuments, ornamental trees, coals, and quarries, have been held exceptions to this rule. *Id.*
4. In a case of breach of contract, the court of chancery will not interfere, where the remedy at law is adequate. *Id.*
5. Where the answer sets up matter of defence in avoidance of the bill, and the answer is traversed, this matter must be proved, independent of the answer. *Lane* v. *Marshall et al.* 85
6. Courts of chancery adopt the same rules in the construction of writings, where there is no mistake or fraud, as courts of law. *Deveraux* v. *Cooper*, 88
7. Chancery will not interfere where there is a remedy at law, *Id.*
8. The right of a defendant in chancery to have his answer taken as evidence, is coextensive with his obligation to answer. *Pierson* v. *Clayes et al.*, 93

9. When defendant, in answer to a bill, set forth a certain proposition in writing, made by him, and then stated conversations and facts to obviate and avoid the effects of the same, such conversations, &c., must be proved. *Id.*
10. A court of chancery will open a decree of foreclosure when the failure of the mortgagor to pay, according to the decree, was not through his negligence or default, but in consequence of propositions of settlement and payment, to be carried into effect after the time of payment had expired, and the failure to perform was on the part of the mortgagee, *Id.*
11. While a bill is pending to be relieved from the forfeiture for not paying the first instalment, the failure of the mortgagor to pay a second instalment, falling due while the bill is pending, is no obstacle to his obtaining relief. *Id.*
12. In cases where courts of law and equity have concurrent jurisdiction, and a claim is barred at law, it will not be suffered to be revived in a court of equity. *Tharp* v. *Tharp*, 105
13. The orator must stand or fall upon the case made by his bill. The answer of the defendant cannot aid the bill, nor can the prayer for a specific relief, though, upon different allegations, the orator might be entitled to the relief prayed for. *Thomas* v. *Warner*, 110
14. An orator, claiming as assignee of a mortgagee, cannot require a defendant to bring a cross bill for the purpose of joining the mortgagee. If that is necessary for the security of the assignee, he should see to it in the progress of the cause, and cannot take advantage of his own neglect. *Ward* v. *Sharp et ux.* 115
15. When a decree is reversed on appeal by defendant, and the cause is remanded, with directions to pass an ultimate decree for orator for a diminished sum, the chancellor will be directed to deduct from orator's costs, the defendant's costs in the court above. *Id.*
16. A master or commissioner is not obliged to make a special report, unless by direction of the court. Nor is he to report evidence. *Mott* v. *Harrington*, 185
17. The chancellor is not, on exceptions to the report, to review the proceedings of the master in relation to an account, or the items thereof. Nor will the supreme court, on appeal, review the decisions of the master on the evidence before him. *Id.*
18. When a master was specially appointed, and the parties had agreed, previously, to refer the subject to him, on account of his knowledge of the subject in controversy, and it had been agreed that he might give an exparte deposition, and send it to one of the parties, it cannot be made an exception to his report, that he had given such deposition. *Id.*
19. The supreme court will rarely, if ever, alter a decree of the chancellor on the subject of cost alone. *Id.*
20. Questions determined by this court, as a court of chancery, before the revised statutes were in operation, are not to be re-examined on an appeal from the chancellor. *Adm'x of Bigelow* v. *Cong. Soc. of Middletown*, 370
21. The report of a master on matters of fact, is to be accepted, unless it plainly appear that he mistook the law or the evidence. *Id.*
22. Chancery will, in some cases, to prevent a failure of justice, decree against the individual members of a society, incorporated under the statute for the support of the gospel. *Id.*
23. Where the defendant neglected to answer a bill in chancery, agreeably to the rules of the court, and the bill was, on that account, taken as confessed, and a decree was made thereon, it was held that the cause was not appealable, though the defendant had not neglected to appear. *Hart* v. *Strong*, 377
24. Chancery will not relieve the maker of a note, given upon the compromising and settlement of a suit brought for the *bona fide* purpose of a recovery, and in which there was evidence tending to prove the allegation on which it was founded, unless it appear that the maker was incapable of understanding the nature, extent and effect of the business he was transacting, or was so overreached as to make the retaining of the note unconscionable. *Paris* v. *Dexter*, 379
25. A court of chancery will correct a written instrument where, through fraud, or mistake, it was written different from the intention of parties. *Goodell* v. *Field*, 448
26. Parol proof is admissible to prove such mistake; but it must be clear and strong to induce a court of chancery to interfere. *Id.*
27. When a party has not fulfilled an agreement of sale by performance on his part, and offers no excuse for his neglect, a court of chancery will not compel the other party to perform his part of the agreement. *Id.*
28. A decree of foreclosure will not be made against a defendant who holds by an older and adverse title to the mortgagor and mortgagee. *Admr's of Lyman* v. *Little et al.*, 576
29. A mortgage will not be corrected as to

description, on the ground of mistake, unless on full proof. *Id.*

30. When a mortgagee has been compelled to pay an existing incumbrance, as well on the lands mortgaged to him, as on other lands held by a defendant, the latter will be decreed to pay his proportion. *Id.*

31. A decree in chancery against an original mortgagor is evidence that the debt is not paid, so as to prevent the operation of the statute of limitations; and so is an acknowledgment of a defendent, who holds adverse to the mortgage, made within fifteen years. *Id.*

32. A bill and decree in chancery, stated in a bill, and admitted in the answer, need not be filed as an exhibit. *Id.*

33. A decree of a chancellor as to cost, will rarely be altered, on appeal. *Id.*

34. A court of equity will not relieve a party from the consequence of not complying with a condition precedent, when the non-compliance arose from inattention or negligence. *Barnet* v. *Passumpsic Turn. Co.*, 757

35. The answer of one defendant, who has ceased to have any interest in the subject in controversy, is no evidence against the other. *Conner* v. *Chase et al*, 764

See CONTRACT, 1.
" LIEN, 1.
" PRACTICE, 3, 4.

CONSIDERATION.

1. D. sold to H. certain articles of personal property, in consideration that H. *had bound* himself, in a bond, to support D. and his wife, during their natural lives. *Held*, that this was an executed consideration. *Devereux* v. *Cooper*, 88

2. When one makes use of the name of another in a suit, to enforce a collection for his own benefit, he is under a *moral obligation* to indemnify him whose name he uses, from any cost or trouble arising from the suit; and such obligation is a sufficient consideration for a promise. *Blodgit* v. *Skinner*, 716

CONDITION PRECEDENT.

See CHANCERY, 34.

CONSTRUCTION OF TERMS.

See U. S. LAWS, 2.
" LESSOR & LESSEE, 4.
" WRITING, 1.

CONTRACT.

1. S. took a contract from D. to convey certain land, and assigned the same to B. & P., who finding, as they supposed, that the title was in a third person, obtained a conveyance from him, and gave up to D. the contract executed by him. *Held*, that B. & P. have no remedy in chancery against S.—the title to the land having failed—even though he might have fraudulently represented to them, upon the assignment, that D. had a good title. *Blanchard & Peake* v. *Stone*, 271

2. When a party to a contract seeks to have it rescinded, he should be able to put the other party *in statu quo*; or, if unable, it should not be through his own negligence or fault. *Id.*

3. Where property had been attached, and receipted to the officer, and was soon after, and before any demand for it had been made, sold by the officer at public auction, by the mutual consent of the officer, the attaching creditors, the debtors and receiptors, it was held that such sale was an implied rescinding of the contract evidenced by the receipt, notwithstanding the sale might have been made under the direction of the receiptors, and operated for their benefit, and the avails of the sale were paid into their hands. *Kelly* v. *Dexter et al.* 310

4. H. contracted with T. & M. to deliver, at a certain place, from 300 to 1000 cords of wood, before a certain time specified in the contract. *Held*, that the delivery by H. of not less than 300 nor more than 1000 cords, at divers times, between the date of the contract, and the time specified therein, vested the property of the wood, thus delivered, in T. & M., so as to make its destruction their loss. *Hunt* v. *Thurman & Martin*, 336

5. The place of delivery, in such case, may be varied, by parol agreement, without otherwise affecting the contract. *Id.*

6. R. & R. made a contract with M. and K to deliver them palm-leaf to be manufactured into hats of a particular description, which they were to receive at a certain sum per dozen. *Held*, that it was proper for R. and R. to charge on book, the palm-leaf when delivered, together with cash advanced; and that, on the neglect or refusal of M. & K. to perform the contract, a recovery might be had against them, for the palm-leaf and cash, in an action on book. *Held*, also, that R. & R. were not obliged to receive a less number of hats than were stipulated in the contract, nor to select out of a large number, sufficient, at the stipulated price, to pay for the cash and palm-leaf

delivered. *J. & J. Rogers* v. *Miller & Kathan*, 431
7. Where one party contracts to do a job of work, and another to pay a stipulated price for the same, and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and full performance, not a condition precedent to any right of action, unless it be expressly so stipulated, or is inferrible by strong implication. *Booth* v. *Tyson*, 515
8. In such cases, the party performing labor, less than full performance, will recover the stipulated price, deducting any damages sustained by the other party, from the failure to perform the entire contract. *Id.*
9. B. N. and K. executed notes to M'G. on the purchase of a saw-mill. Afterwards B. sold to N. his share, without making any contract that N. should indemnify him against the notes to M'G. N. and K. afterwards sold the mill to G.;—*Held*, that B. could not defend against the notes he gave to M'G. in consequence of any executory contract between M'G. and N. to which B. was not a party. *M'Gregor* v. *Bugbee*, 734
10. A parol contract between M'G., N. and G. might be varied or controlled by them before it was executed. *Id.*
11. N. could lawfully dispose of the notes or property received on his sale to G. without applying the proceeds to the benefit of B. *Id.*

See CHANCERY, 4.

CORPORATIONS.

1. By the law of this state, corporations can convey lands, tenements, and hereditaments only by deed executed by some agent, thereunto authorized by vote of the corporation. *Wheelock* v. *Moulton et al.* 519
2. The shareholders, as such, cannot convey the real estate of the corporaton, though they all join in the deed. *Id.*
3. The name and seal of the principal must be affixed to a conveyance by an agent, or, in the case of a corporation, what, by statute, is made equivalent, the vote of the corporation giving the power to convey, must be recited. *Id.*

COST.

1. The right of a plaintiff, after a review by the defendant in an action of assault and battery, to recover full costs upon the recovery of a sum in damages not exceeding seven dollars, is restricted, under the twenty-second and twenty-third sections of chapter 106 of the Revised Statutes, to cases in which the damages in the judgment reviewed from, did not exceed seven dollars. *Plumley* v. *Marsh*, 306
2. A decree of a chancellor as to cost, will rarely be altered, on appeal. *Admr's of Lyman* v. *Little et al.* 576

See PRACTICE, 9.

COURTS MARTIAL.

The judgments of courts martial are conclusive, like those of any other courts, unless some defect in regard to their jurisdiction is shown. *Brown* v. *Wadsworth & White*, 170

COVENANT.

1. If one convey land, sequestered to the use of the University of Vermont, and covenant to warrant and defend the same against all lawful claims, this covenant extends to the claim of the University for rent. *Keith v. Day*, 660
2. If the rent be permitted to run behind, and the grantee suffer an eviction, in consequence of not paying it, he may recover the value of the land, at the time of eviction, as damages for the breach of such covenant. *Id.*
3. But if in such case the grantee have conveyed some portion of the land to others, by deed of release merely, he cannot recover damages for such portion of the land, although the eviction extended to the whole parcel. *Id.*
4. *Quære*, whether he might not have recovered damages for the entire breach of the covenant, if he had conveyed by deed of warranty. *Id.*
5. Any conveyance of the land, after the eviction, will not affect the right of recovery. *Id.*
6. In an action on the covenants of a deed against incumbrances, in support of which the plaintiff relies on a prior mortgage of the premises by the defendant, proof that the notes, on which the mortgage was founded, were paid and taken up, will entitle the defendant to a verdict, notwithstanding the mortgage deed was not discharged on the record. *Judevine* v. *Pennock*, 683

D

DAMAGES, RULE OF.

1. When damages are claimed of a town, for injuries sustained by reason of the insufficiency and want of repair of a road or bridge, the right to recover will not depend upon the town's having notice of such defect. *Bardwell & Huntington* v. *Jamaica*, 438
2. When the *primary* cause of the damage was occasioned by the fault of the town, the person injured will be entitled to the whole amount of the damage, unless it has been increased by his own subsequent negligence or misconduct. *Id*

See COVENANT, 2, 3, 4.

DEED.

1. A vendue deed, when the proceedings were not recorded in pursuance of the statute, does not convey any title. *Giddings & Wife et al.* v. *Smith et al.* 344
2. When words made use of in a conveyance are contradictory, those more specific and particular will control those which are more general. *Wheelock* v. *Moulton et al.*, 519
3. In case of apparent contradiction in the terms of a deed, the subsequent conduct of the parties may determine the sense in which they understood it at the time of its execution. *Id.*
4. Parol proof is not admissible to show an absolute deed intended as a mortgage, when the grantor conveys by deed of warranty, and possession follows the deed through several successive grantees. *Conner* v. *Chase et al.*, 764

See WILL, 4, 5.

DELIVERY.

See CONTRACT, 4, 5.

DEPOSITION.

1. It is no valid objection to the caption of a deposition, that the time of the session of the court when it is to be used, is no otherwise stated than as the court next to be holden, &c. *Clark* v. *Brown*, 658
2. A deposition, *ex parte*, need not be filed thirty days before the session of the court next after it is taken, when a term of the court intervenes between the time of the taking and using of the same. *Id.*

DIVORCE.

In order to the granting of a bill of divorce under the clause of the statute authorizing a divorce when the husband grossly, wantonly, and cruelly refuses or neglects to provide a maintenance for the wife, being of sufficient ability, something more must be shown than a mere wilful desertion and refusal of support. *Mandigo* v. *Mandigo*, 786

DOWER.

A widow may bar her claim to dower in a particular lot by a quit-claim deed thereof, executed before her dower has been assigned, in which she covenants that she will have and claim no right to the quit-claimed premises. *Grant* v. *Parham*, 649

See LESSOR and LESSEE, 4.

E

EJECTMENT.

1. An assertion, by a joint owner of land, of an exclusive title to the whole, and a contracting to sell the whole, are evidence of an *adverse* possession, and such an ouster as to enable the co-tenant to maintain ejectment *Carpenter* v. *Thayer et al.*, 552
2. A plaintiff in ejectment is not precluded from recovering on the ground of having executed a deed to a third person while the premises were holden by another adversely to both parties to the deed. *Parkhurst* v. *Edwards*, 618

See TENANTS IN COMMON, 1.

ERROR.

1. The continuance of a cause before an auditor is matter of discretion; and, the county court having accepted the report and rendered judgment thereon, the party is concluded — the matter resting in the discretion of the court, and not being a matter of error. *Hickok & Catlin* v. *Ridley*, 42
2. It is not error in the county court, in stating in a bill of exceptions the charge given to the jury, to refer to another bill of exceptions, as containing the charge given in the case; it being but the mak-

ing a copy of the charge in one case, a part of the bill of exceptions in the other. *St. Johnsbury* v. *Waterford*, 692

EVIDENCE.

1. In an action of assumpsit for service as an attorney, the pocket docket of the plaintiff, on which is entered the name of the case in which he acted as counsel, of itself, furnishes no evidence of his right to charge for his services. *Briggs* v. *Georgia*, 61
2. Plaintiff having argued a cause, at the suggestion of the counsel employed in it, his subsequent assent to a proposal of the counsel to make application to his client, to engage plaintiff in the cause, may be given in evidence, for the purpose of showing whether plaintiff rendered the service, expecting to be paid for it. *Id.*
3. A justice record cannot be contradicted by parol proof. *Pike* v. *Hill*, 183
4. The deposition of a witness was taken, by reason of his disability to appear in court. He, nevertheless, appeared and testified on the trial. *Held*, that the deposition might be used as evidence in chief, in a subsequent trial of the same cause, the witness having, in the mean time, died; and that the admissible character of the deposition was not affected by a sworn repetition of the testimony the witness had given in court on the former trial. *Starksboro* v. *Hinesburgh*, 200
5. In an action on the covenants of a deed against incumbrances, in support of which the plaintiff relies on a prior mortgage of the premises by the defendant, proof that the notes, on which the mortgage was founded, were paid and taken up, will entitle the defendant to a verdict, notwithstanding the mortgage deed was not discharged on the record. *Judevine* v. *Pennock*, 683
6. The certificate of a town clerk, that a person has not conveyed land, is not evidence of that fact, but it must be proved by the oath of a witness or witnesses. *Hill* v. *Bellows*, 727
7. A receipt or writing is the best evidence of a contract, and is not to be controlled by any oral testimony relating to the contract, unless the contract evidenced by the writing or receipt is rescinded. *McGregor* v. *Bugbee*, 734
8. Parol proof is not admissible to show an absolute deed intended as a mortgage, when the grantor conveys by deed of warranty, and possession follows the deed through several successive grantees. *Conner* v. *Chase et al.*, 764
9. Length of time, short of the period which will bar redemption, may afford a strong presumption against a claim set up as an equitable right of redemption, resting wholly on oral testimony. *Id.*

See FRAUDULENT CONVEYANCE, 2, 3.
" TURNPIKE, 1, 2.
" INDICTMENT, 10.

EXECUTION.

If an officer be required to make a levy upon real estate, and make the levy so defective that no title pass by it, he is liable to an action and to nominal damages, notwithstanding he show that the debtor had, at the time, no valid title to the same. *Bell* v. *Roberts*, 741

See OFFICER, 8.

F

FIRE COMPANY.

An enlistment into a fire company, from an independent company of militia, works an exemption from military duty, under the militia law of 1837, the same as such enlistment from a standing company. *Irish* v. *Mattison*, 381

FRAUDS, STATUTE OF.

1. To bring a case within the statute of frauds, it is necessary that the undertaking should be collateral to, and in aid of, the promise of another. *R. & J. Wainwright* v. *Straw & Cunningham*, 215
2. A. owed B. and sent him with a verbal order to procure the money from C. on A.'s account. C. refused to pay upon a verbal order, and required B. to bring a written order from A., or else to give his own accountable receipt for the money. B. received the money and gave his receipt to account to C. for it on demand. Afterwards C. called on B. and threatened to commence a suit upon his receipt. Of this B. notified A., relying upon him to settle the demand of C. A. claimed that he had already paid it to C. in discharge of B. And to induce B. to submit to a suit in favor of C., and thereby afford A. an opportunity to prove such payment, A. and D. promised to indemnify B. against any judgment

which C. might recover, as also against the expense of defending C.'s suit. *Held*, that the promise of A. and D. was not affected by the statute of frauds. *Peck* v. *Thompsons*, 637
3. The statute of frauds and perjuries applies to executory contracts. *Ide & Smith* v. *Stanton*, 685
4. A written admission of a previous verbal contract, will satisfy the statute. *Id.*
5. The evidence necessary to constitute a sufficient note or memorandum of a bargain, need not be confined to a single paper or document. *Id.*
6. The written note or memorandum must, either by its own language, or by reference to something else, contain such a description of the contract as shall dispense with the necessity of resorting to parol evidence to supply any thing essential to give it validity. *Id.*
7. A stipulated price enters into the legal contemplation of a bargain; and, therefore, a note or memorandum which does not furnish evidence of price, is not sufficient to take a contract of sale out of the statute of frauds and perjuries. *Id.*

FRAUDULENT CONVEYANCES.

1. A creditor may maintain a trustee process against the vendee of property, fraudulently purchased to keep it from being attached, and is not obliged to try the validity of the sale by attaching the property. *Crane* v. *Stickles & Trustees*, 252
2. Where one disposes of all his property to secure a future support through life, making no provision for the payment of his debts, the sale as to his creditors, is fraudulent and void. *Id.*
3. Knowledge of a parol contract, between a prior grantor and grantee, will not affect one who purchases from the person having both the legal title and possession, unless he purchases fraudulently, and with intent to defeat the equitable claim of the first grantor. *Conner* v. *Chase et al.* 764

See HUSBAND & WIFE, 1.
" POSSESSION, 1.

FRAUDULENT REPRESENTATION.

1. In an action for a false and fraudulent representation, by reason whereof credit is given for goods sold, it is sufficient to allege the substance of the representation, without attempting a literal recital. *Montague* v. *Adams*, 237
2. The same amount of evidence is not necessary, in such a case, as in a criminal prosecution. *Id.*
3. A declaration, that defendant represented in substance, that a purchaser of goods was a fit person to be trusted, and that goods might be safely sold to him on credit, is not supported by proof, that defendant said he was doing a fair business. *Id.*
4. A court of chancery will correct a written instrument where, through fraud or mistake, it was written different from the intention of the parties. *Goodell* v. *Field*, 448

G

GRAND LIST.

1 The selectmen of a town refused to receive the disclosure of a person assessed for money at interest, and he afterwards agreed to appear before them and make his disclosure, and neglected so to do, and there was no subsequent refusal or neglect on their part, to receive such disclosure. *Held*, that his agreement and neglect was a waiver of any claim on account of the refusal. *Cooley* v. *Aiken*, 322
2. Mere circumstantial errors in the details of making up the grand list, will not render it void, as a basis of taxation. *Henry* v. *Chester*, 460
3. The list will not be rendered void by any error of judgment in the listers, in a matter properly within their discretion. *Id.*
4. If the appraisal of real estate by the listers be not submitted to the supervision of the county and state committees, or if such alterations as they require, are not made, the list is incomplete, and an assessment of taxes thereon, void. *Id.*
5. The persons who have been compelled to pay taxes to the town, assessed upon such list, may recover back the full amount, in an action of assumpsit for money had and received. *Id.*

See TAXES.

GRANT.

1. The charter of the town of Newbury, granted by the governor of New-York to Jacob Bayley and others, was in confirmation of a grant of said town previously made by the governor of New-Hampshire, and said Bayley held the township, so granted, in trust for the proprietors

named in the charter from the governor of New-Hampshire. *Johnson* v. *Bayley*, 595

2. Where a grantee under the New-Hampshire charter had always claimed a particular right,—paid all the taxes thereon, but had never taken possession of a wild lot belonging to such right, he was treated as the owner of such lot and said Bayley as holding in trust for him, and where the administrator of said Bayley had sold and deeded the lot to the defendant, after a lapse of over sixty years from the time of said grant, the defendant was decreed to convey the lot to the orator, who was the owner thereof under a proprietor named in the N. H. charter, and had always paid the taxes thereon. *Id.*

GRANTOR AND GRANTEE.

Knowledge of a parol contract, between a prior grantor and grantee, will not affect one who purchases from the person having both the legal title and possession, unless he purchases fraudulently, and with intent to defeat the equitable claim of the first grantor. *Conner* v. *Chase et al.* 764

H

HIGHWAYS.

1. Towns cannot be made liable for the expense of building a road, by subsequently repairing the same, and suffering the public to use it as a highway. *Pratt et al* v. *Swanton*, 147
2. In an action against a town, to recover damages occasioned by the insufficiency of a road, it is a question of fact, or a mixed question of law and fact, whether the road was out of repair,—as, also, whether the town was justly chargeable with neglect of duty,—whether the plaintiff's injury was caused by such want of repair,—and whether the plaintiff used proper exertions to avoid the injury. *Kelsey* v. *Glover*, 708
3. It is the duty of a town, in the construction and repair of roads, to provide for the reasonable safety of travellers in reference to such accidents as may be expected to happen on such roads. *Id.*
4. The act of the legislature, passed in 1839, authorizing the supreme and county courts to take the franchise of a turnpike corporation for a public highway, is constitutional. *Armington et al* v. *Barnet, Ryegate and Newbury.* 745

See DAMAGES, 1, 2.
" TURNPIKE, 5.

HIGHWAY SURVEYOR.

1. The refusal of a highway surveyor to execute a receipt for a tax bill, does not vacate his office. *Cummings* v. *Clark et al.* 653

HUSBAND AND WIFE.

1. Where a feme sole is seized, in fee, of several parcels of land, and marries, and then joins with her husband in a mortgage of a part of them, to secure his debt, if the husband and wife afterwards sell the whole, subject to the mortgage, which the grantees assume to pay, and the balance of the purchase money be secured to a trustee for the separate use of the wife—such balance not exceeding her reversionary interest in the lands—the grantees will not be subjected to a *qui tam* prosecution, for a penalty under the statute to prevent fraudulent conveyances, though it was the intention of the parties to the conveyance, to secure to the wife such balance from the proceeds of the sale. *Burns* v. *Brown and Brown*, 174
2. A promise by the husband, that he will see a debt paid, which the wife owed when sole, and which is barred by the statute of limitations, will not remove the statute bar, in a suit against husband and wife. *Powers* v. *Southgate*, 471
3. Chancery will uphold a post nuptial agreement between husband and wife, where the claims of creditors will not be prejudiced, the object of which was to create a trust estate for the *separate* use of the wife, by means of a purchase made from the personal earnings of the wife, and property inherited by her during coverture, or loaned to her for such specific object—the husband being unable to provide a support. *Pinney et al* v. *W. & C. Fellows*, 525
4. When one person purchases lands with his own money, and takes a deed to another, a trust results by operation of law, to the person making the purchase; and the same result follows where a feme covert purchasers with the consent of her husband, for her separate use, with means which she was the meritorious cause of acquiring. *Id.*
5. Though the deed recites the considera-

tion to have been received from the nominal purchaser, yet the cestui que trust will be allowed to prove, by the trustee himself, that it was her money. *Id.*
6. A part payment of the consideration, at the time of the purchase, will charge the land with the trust, *pro tanto*. *Id.*
7. The statute of 1707 did not require that the *creation* of a trust in lands should be by writing, but simply that it be manifested and proved by some writing. *Id.*
8. The deposition of the trustee, subscribed and sworn to by him, fully proving the trust, was held a sufficient manifestation and proof of it, in writing, in a suit between the cestui que trust and an attaching creditor of the trustee. *Id.*
9. The wife being in the open and exclusive use and possession, in conjunction with her husband, of her trust estate, for a series of years, will affect the attaching creditor of the trustee with notice of her trust interest, and place him in no better situation than the trustee himself. *Id.*
10. *Quære.*—Is the attaching creditor, as to the time of notice, to be treated as a purchaser of the estate before levey of his execution? *Id.*
11. A husband is not liable to an attorney for professional services rendered his wife, in defending against a petition for divorce, preferred by him, or in procuring a bill of divorce, on her petition. *Wing* v. *Hurlburt*, 607

See SETTLEMENT, 2.

I

INDICTMENT.

1. An indictment against an individual, unconnected with others, for aught that was averred, predicated upon that section of the statute relative to offences against public policy, which inflicts a penalty upon each individual of any company of players or persons whatever who shall exhibit any tragedies, &c., is insufficient. *State* v. *Fox*, 22
2. In an indictment for obtaining goods and chattels by false pretences, it is necessary to allege that they were the property of some person, as in a case of larceny, or an excuse must be stated for not making the averment. *State* v. *Lathrop*, 279
3. In an indictment against a person for selling spirituous liquors by the small measure, without a license, it is not necessary that it should be averred to whom they were sold, or the number of the persons. *State* v. *Munger*, 290
4. An averment that the respondent sold *rum*, *brandy*, and *gin*, is sufficient, without an averment that they were spirituous liquors. *Id.*
5. The negation of license must be broad enough to cover all the sources from which it might have been obtained. *Id.*
6. If the negation of license to sell is, as to quantity, co extensive with the quantity charged to be sold, it is sufficient. *Id.*
7. The general negation — "not having a license to sell said liquors, *as aforesaid*," relates to the time of sale, and not to the time of finding of the bill, and is sufficient. *Id.*
8. It is not necessary that the offence of selling spirituous liquors without a license, should be charged to have been committed with force and arms. *Id.*
9. Where a distinct sale of spirituous liquors is alleged to have been made on a day certain, the count is not vitiated by adding an averment of sales at divers times between that, and the finding of the bill; but the averment may be regarded as surplusage. *Id.*
10. The respondent being one of the firm, and having made out a bill of the sale of goods at sundry times, in his own handwriting, upon which was entered the sale of spirituous liquors by the small measure, at different times, and which had been receipted by him, such bill of sale is competent evidence to go to the jury to prove a sale; and the person to whom the sale was made need not be produced. *Id.*
11. It is no valid objection that the sale purports, by the bill, to have been made on a different day from the one charged in the indictment. *Id.*
12. It is not error for the court to charge the jury that, upon such evidence, they could find the respondent guilty. *Id.*
13. In an indictment for selling spirituous liquors by the small measure, without license, the omission of the auxiliary verb "*did*," which should have been joined with the words "*sell and dispose of*," is not fatal upon a motion in arrest. *State* v. *Whitney*, 298
14. The county court have original jurisdiction in such case, though the fine is limited to ten dollars. *Id.*
15. The penalty for "dealing in the selling of foreign or domestic distilled spirituous liquors" may be incurred by a single act of selling without license. *State* v. *Chandler & Keyes*, 425
16. The fact that the liquor is bought for medicine, does not exempt from the penalty. *Id.*

17. The keeping and selling, by a retailer, of some of the articles used by apothecaries, does not constitute him an apothecary, but there must be combined therewith skill in the preparation of medicines. *Id.*
18. Where it becomes necessary, in charging the commission of an offence, to allege that a certain term of a county court was duly holden, it is not sufficient to allege that it was holden by and before the chief judge of such court, without mention of any assistant judge. If either of the judges is named, it should appear that, at least, a quorum of the court held the term. *State* v. *Freeman*, 723
19. So if it be alleged that a particular cause was tried, by and before the chief judge, it should appear that one or both of the other judges assisted to try it, or that they were unable or disqualified to sit on the trial. *Id.*

See VARIANCE, 1.

INTEREST.

A debtor remaining upon the jail liberties, on a commitment on execution, is not liable for the interest accruing on the debt, if he pay the amount due on the execution at the time of commitment, before departing the liberties. *Allen* v. *Adams & Allen*, 16

IMPRISONMENT FOR DEBT.

1. An affidavit of a creditor, that his debtor is about to *leave* the state, is not sufficient to warrant the issuing of an attachment against the body of the debtor, under the act exempting the body from imprisonment, in actions founded on contracts made after the first day of January, 1839. *Aiken* v. *Richardson*, 500
2. A writ of attachment against the body, issued without the required affidavit, is void, and an arrest under it, illegal. *Id.*
3. Acquiescence of the debtor in such arrest, gives the plaintiff no right as against the bail, who may take advantage of the defect, by plea, in an action against him. *Id.*

J

JUDGMENT.

1. Judgments take effect from the time they are rendered, and not from the time they are recorded. *Huntington* v. *Charlotte*, 46
2. The judgments of courts martial are conclusive, like those of any other courts, unless some defect in regard to their jurisdiction is shown. *Brown* v. *Wadsworth & White*, 170
3. That the court expressed to the jury an opinion in relation to the weight of the testimony, is no ground for reversing the judgment, especially when the court directed the jury to find the fact from the evidence before them, and when the charge did not induce a wrong verdict. *Yale* v. *Seely et al.*, 221

JUDGMENT *non obstante veredicto*.

When a plaintiff, in his replication, traverses an immaterial fact, which is found in his favor, the defendant cannot have judgment, *veredicto non obstante*. *Stoughton* v. *Mott*, 162

See ABSCONDING DEBTOR.

JURISDICTION.

1. It will be presumed, that the supreme court, before granting a bill of divorce, ascertained that they had jurisdiction of the *case*, and of the *parties*, although it may not appear of record. *Huntington* v. *Charlotte*, 46
2. In cases where courts of law and equity have concurrent jurisdiction, and a claim is barred at law, it will not be suffered to be revived in a court of equity *Tharp* v. *Tharp*, 105
3. The court will not dismiss a cause for want of jurisdiction of the county court, when no such motion was made there, and the *ad damnum* is over one hundred dollars, and it does not appear that the plaintiff, in laying his damages, improperly attempted to give jurisdiction to that court. *Cooley* v. *Aiken*, 322
4. The county court have original jurisdiction of a suit, upon a promissory note, exceeding forty dollars, and less than one hundred dollars, where the suit is by trustee process. *Hobart* v. *Wardner*, 564
5. Such suit will not be dismissed for want of jurisdiction in the county court, though the trustee should, on trial, be dismissed, in cases where the principal defendant appears in the suit, or where the writ issues as a general attachment, and is served by attaching personal property in possession. *Id.*
6. The county court have appellate jurisdiction, in a case where the balance char-

ged in the new account, and the other items of charge, do not exceed one hundred dollars, though the items embraced in the settlement, and the other items, should exceed that sum. *Spear* v. *Peck*, 566

7. When the principal of a note, together with the interest, exceeds twenty dollars, the right of appeal from a judgment of a justice, thereon, is not taken away by statute. *Smith* v. *Smith*, 620

See INDICTMENT, 14.

JUSTICE OF THE PEACE.

See EVIDENCE, 3.

JUSTIFICATION.

See SEARCH WARRANT, 1.

L

LESSOR AND LESSEE.

1. A landlord may declare against an assignee of his lessee, for a share of the rent reserved in the lease, proportioned to the relative value of the part held by assignment. *Pingrey* v. *Watkins*, 479
2. *Quære* — Whether, upon an allegation that all the estate, interest, &c., of the lessee came by assignment, to the defendant, proof that part only of the leasehold premises was assigned, is a variance. *Id.*
3. A reversionary estate in fee, and a particular estate for life or years, may be conveyed by the same deed. *Id.*
4. C. W. received from N. P. and his wife, widow of E. W., a lease during her life, of all the estate set off to her as dower, from the estate of E. W., which consisted of certain buildings, and 37 acres of land. The estate of E. W. had been assigned to E. W. the younger, who had deceased, leaving the said C. W and five other children; and the reversion of said buildings had been assigned, by a committee, to C. W., and of the 37 acres, to the said other five children. C. W. executed a deed to J. W., conveying all his right, title, &c. in the buildings and land on which they stood, as "described by the doings of the committee on record," and, also, "one other piece set off by said committee of *the reversion* of the widow of E. W.;" and it was proved that the land assigned as *dower* to said widow, had been known in the family, and acquired the name of the *reversion*, and was so denominated in the partition among the heirs of E. W. the younger. *Held*, that "the *reversion*" must be taken to mean the *dower* of said widow, and, therefore, that the conveyance to J. W. embraced the leasehold interest of C. W. in the 37 acres, so as to hold J. W. for the payment of rent thereon, as assignee of C. W. *Id.*

LIEN.

1. H. conveyed to M. & H. certain premises, taking back a bond of defeasance. By a subsequent arrangement between these parties, for the purpose of enabling H. to pay the amount due to M. & H. upon the mortgage, the former surrendered to the latter their bond of defeasance, who, thereupon, conveyed the premises to R. H. to whom H., at the same time, conveyed whatever interest he was supposed to have in them. R. H. thereupon advanced a certain sum which went to M. & H. in satisfaction of what was mutually estimated, and believed, by H. and M. & H. to be due the latter; and R. H., at the same time, executed a bond of defeasance to H.; — *Held*, that, although the sum estimated to be due to M. & H., and advanced by R. H., fell short of the sum actually due, there remained no subsisting lien upon the premises in favor of M. & H. for the security of such balance. *Hodgman* v. *Hitchcock et al.*, 374
2. The attorney has a lien upon an award of arbitrators, where a pending suit is referred, to the full extent of all his just claims as attorney in the suit. *Hutchinson & Buchanan* v. *Howard et al.* 544
3. This lien cannot be defeated by attachment, under the trustee process. *Id.*
4. *Dictum* — It seems well settled that the attorney has a general lien upon all papers in his possession, and all sums equitably due thereon, for any balance due him upon other matters, as well as in the particular suit. *Id.*

LIMITATION, STATUTE OF.

1. In cases where courts of law and equity have concurrent jurisdiction, and a claim is barred at law, it will not be suffered to be revived in a court of equity. *Tharp* v. *Tharp*, 105
2. A promise by the husband, that he will see a debt paid, which the wife owed when sole, and which is barred by the

statute of limitations, will not remove the statute bar, in a suit against husband and wife. *Powers* v. *Southgate et ux.*, 471

3. An acknowledgment, by a debtor, that certain notes exist, and that he has an account to go against them, and a promise to call in a certain time, and have the notes and account settled, are sufficient to remove the bar interposed by the statute of limitations. *Admr's of J. Chapin* v. *A. & W. Warden*, 560
4. When there is no dispute about the facts which are insisted on, as taking a case out of the statute of limitations, the question involved is one of mere law; but when the facts are doubtful, it is a mixed question of law and fact. *Id.*
5. An issue, upon a replication of a new promise, to a plea of the statute of limitations, was tried by the court. The facts being undisputed, it was held that the decision might be revised by the supreme court, on exceptions. *Id.*
6. When a debtor, against whom there is cause of action, is out of the state at the time the cause of action accrues, the statute of limitations will not run on the demand, unless he returns into the state, and that fact is known to the creditor. *Hill* v. *Bellows*, 727
7. If a debtor, absent from the state, would avail himself of the statute of limitations on the ground of his having, in the state, property subject to attachment, it is incumbent on him to show this fact; and it is not sufficient to show that he has deeds of land on record, without showing a title in himself. *Id.*

See WILL, 6.
" MORTGAGE, 4.

M

MILITIA.

An enlistment into a fire company, from an independent company of militia, works an exemption from military duty, under the militia law of 1837, the same as such enlistment from a standing company. *Irish* v. *Mathson*, 381

MILITARY EXPEDITION.

See U. S. LAWS.

MORTGAGE.

1. A decree of foreclosure will not be made against a defendant who holds by an older and adverse title to the mortgagor and mortgagee. *Admr's of Lyman* v. *Little et al.*, 576
2. A mortgage will not be corrected as to description, on the ground of mistake, unless on full proof. *Id.*
3. When a mortgagee has been compelled to pay an existing incumbrance, as well on the lands mortgaged to him, as on other lands held by a defendant, the latter will be decreed to pay his proportion. *Id.*
4. A decree in chancery against an original mortgagor is evidence that the debt is not paid, so as to prevent the operation of the statute of limitations; and so is an acknowledgment of a defendant, who holds adverse to the mortgagee, made within fifteen years. *Id.*

N

NEUTRALITY ACT.

See U. S. LAWS, 1.

NEW TRIAL.

A want of a freehold qualification in one of the jurors, is a ground for a new trial, if the fact was not known to the party making the motion, at the time of the trial. *Briggs* v. *Georgia*, 61

NOTICE.

See VEXATIOUS SUIT, 2, 3.

O

OFFICER.

1. If an officer enters the dwelling house of the person against whom process issues, the door being open, and without doing any unnecessary damage, to execute the same, the owner of the house cannot maintain trespass against the party who prays out the process, although the goods were not found. *Chipman* v. *Bates*, 51
2. *Quere* — Whether the party would be liable in such action, if the door had been forcibly broken open by the officer. *Id.*

3. *Quere* — Whether an officer is liable for omitting to make a return of *nulla bona*. *Harrington* v. *Bogue*, 179
4. An officer may maintain an action against a principal, for goods sold on an execution to his agent, notwithstanding his return on the execution describes the sale to have been made to the individual who acted as agent, — the agency not having been disclosed at the time of purchase. *Carney* v. *Dennison & Gore*, 400
5. Trover may be maintained by an officer, against a debtor, for property which had been owned and possessed by the debtor, and receipted by him to the officer, as attached, though it was not actually seized, or even seen, by the officer. *Pettes* v. *Marsh*, 454
6. An officer cannot be made a trespasser, *ab initio*, for an abuse of an authority, unless it be the same authority upon which was the original taking. Hence —
7. If an officer, in attaching the interest of one tenant in common, in an entire chattel, take possession of the chattel, and hold it, until the issuing of the execution, and then sell the entire property, and thus divest the interest of the other tenant, so as to amount to a conversion of his property in it, he does not, thereby, become a trespasser, *ab initio*. *Heald* v. *Surgeant*, 506
8. A person not duly appointed to an office, cannot justify his acts on the ground that he was an officer, *de facto*. *Cummings* v. *Clark et al.* 653
9. If an officer be required to make a levy upon real estate, and make the levy so defective that no title pass by it, he is liable to an action and to nominal damages, notwithstanding he show that the debtor had, at the time, no valid title to the same. *Bell* v. *Roberts*, 741

See TROVER, 1, 2.
" CONTRACT, 4.

OFFSET.

1. If demands are, in reality, mutual, though not nominally so, and equity requires a set off to be made, chancery will make it. *Foot* v. *Ketchum & Shaw*, and *Ketchum* v. *Foot*, 258
2. The assignee of a chose in action takes it subject to all the equity existing at the time, in the original obligor or debtor. *Id.*
3. A negotiable note assigned by parol, after it has ceased to be current, is subject to the same rule. *Id.*
4. A promise, without consideration, by the obligor to the assignee, after assignment, to pay the demand, and which had, in no way, been made the basis of action, or an occasion of prejudice to the assignee, cannot, as matter of law, estop or conclude the obligor from setting up an equitable set-off against the assignee, which existed against the assignor, at the time of the assignment. *Id.*
5. Before accounts can be set off in chancery, they must be liquidated. *Id.*
6. Where the assignee of a note instituted a suit on it in the name of the payees, and the maker filed a declaration on book in offset, against one of the payees, to whom the note belonged, and from whom the assignee claimed, and there was a judgment to account, and a trial before the auditors, at which the assignee appeared and defended, it was held that the report of the auditors, which had been returned to, and accepted by, the court, was a sufficient liquidation of the account of the maker of the note, to make it the basis of a set-off in chancery, against the assignee. *Id.*
7. The repeal of the proviso to the statute of 1798, allowing equitable defences to promissory notes, negotiated, took full effect on the first day of January, 1837, and cut off all such defences accruing after that date, though the notes bore date anterior to that time. *Farr* v. *Brigham*, 557
8. Such defences depend on the law in force at the time they accrue, and not necessarily upon the law in force at the time the contract was executed, to which they are offered. *Id.*

P

PARTNERS AND PARTNERSHIP.

1. It is not necessary that there should be a definite contract of partnership to constitute "a company of persons," competent to take a conveyance under said act. *State* v. *Town of Shrewsbury*, 283
2. C. had dealings with W., and W. employed him to labor on a farm which was owned and carried on by W. and another, in partnership; but the partnership was not known to C. until after suit commenced: *Held*, that C. might recover in the action against W. for the labor done for the partnership. *Cleveland* v. *Woodward*, 302

PAUPER.

1. A married woman is not liable to be removed, as a pauper, from her husband, or from the place of his actual residence,

to the place of her own legal settlement, though the husband may have no settlement within the state. *Northfield* v. *Roxbury*, 622

2. The right of one town to recover of anothher, expenses incurred in the support of a pauper, is not affected by the residence of the pauper during the pendency of the action. *St. Johnsbury* v. *Waterford*, 692
3. The ability of paupers to maintain themselves is a pecuniary ability, and is not affected by the manner in which they have previously disposed of their property, if the disposition has been so made as to be binding on them. *Id.*
4. The declarations of the pauper or her husband are not evidence in the case. *Id.*
5. Towns have a right to recover of other towns chargeable with the maintenance of insane paupers, the expense of supporting them at an insane asylum, unless it increase the expense of maintenance. *Id.*
6. Towns may recover, in like manner, for clothing destroyed by an insane pauper, without fault of the overseers or keepers. *Id.*
7. Towns may, in like manner, recover for money paid to other towns for the support of paupers upon orders of removal, afterwards vacated, if it do not exceed the expense of keeping in the town procuring the removal. *Id.*

See BASTARDY.
" SETTLEMENT.

PAYMENT.

1. When service is performed in payment of a pre-existing debt, no recovery can be had therefor. *Adm'r of Beeman* v. *Webster*, 141
2. *Quære*— Whether any recovery can be had, by an administrator, in an action pending at the decease of his intestate, when the defendant has presented a claim to the commissioners on the estate of the deceased, and they have allowed him the same, without any objection by the administrator against their proceedings. *Id.*
3. A tender of money or specific articles of property, is not, technically, a payment. *Downer* v. *Sinclair et al.*, 495
4. Where one agrees with his judgment debtor to receive from him, in payment, within a specified time, certain articles of his manufacture, and the debtor has the property ready and sets it out at his shop, within the time, for the purpose of payment, it will be a good defence, under a plea in bar, to an action on the judgment. *Id.*
5. Goods, or services furnished, or rendered, after the commencement of a suit, become a part of the account; and the party furnishing, or rendering, is not obliged, while the suit is pending, to receive pay for a single charge. *Wing* v. *Hurlburt*, 607

PERSONAL PROPERTY.

1. Neither a mortgage nor pledge of, nor a lien upon, personal property can be available against subsequent attachments without a change of possession. *Russell* v. *Fillmore*, 130
2. An interest created by a pledge of personal property may be assigned. *Id.*

PLEAS AND PLEADING.

1. A plea in bar to part of a declaration or count is good, if it is a good answer to all which it professes to answer, although it does not answer the whole declaration. *Carpenter & Buel* v. *Briggs & French*, 34
2. According to the practice in this state, that part of the declaration to which there is no answer is confessed, and judgment will be entered accordingly, at the proper time. *Id.*
3. Notice of special matter cannot be received under a plea of *nul tiel record*. *Card* v. *Sargeant*, 393
4. If the facts tended to prove the issue, in the county court, the supreme court cannot inquire into their sufficiency, nor revise any decision founded upon them. *Id.*
5. The supreme court will only pass upon such questions as are reserved by the county court; and when the parties make their pleadings, and join their issues, and take their trial in that court without objection, whatever informality there may have been in the pleadings will be understood to have been waived. *Id.*
6. Whether an action is *trespass*, or *trespass on the case*, is to be determined from the facts alleged in the declaration, and not from the name given to the action. *Coggswell* v. *Baldwin*, 404
7. It is a good replication to a plea in offset of a judgment recovered, that the whole judgment had been assigned to third persons, of which notice had been given to the judgment debtor. *Day* v. *Abbott*, 632
8. In such case it is not necessary that the judgment debtor, in replying such assignment, should allege that the interest of the assignee is still subsisting. If the

judgment creditor would avail himself of the ceasing of the assignee's interest, he must set it forth in a rejoinder. *Id.*

9. A replication setting forth an assignment of part of the judgment to one, and the residue to another, is not double. *Id.*
10. *Quere*, whether, if the whole legal interest had been assigned to one, the statement of another assignment would not be treated as surplusage. *Id.*
11. *Quere*, whether, in an action on book, commenced before the Revised Statutes went into operation, a plea in off-set can be sustained. *Id.*
12. If the plaintiff, in an action commenced before a justice of the peace, and appealed to the county court, files a new declaration in the county court, for a different *cause of action*, and the defendant, without objection to its being received, takes issue under it, either upon matter of law or matter of fact, it will be considered as a waiver of the variance between the old and the new declaration. *Blodget* v. *Skinner*, 716
13. The variance should be taken advantage of by a motion to dismiss the new declaration. *Id.*
14. Where it becomes necessary, in charging the commission of an offence, to allege that a certain term of a county court was duly holden, it is not sufficient to allege that it was holden by and before the chief judge of such court, without mention of any assistant judge. If either of the judges is named, it should appear that, at least, a quorum of the court held the term. *State* v. *Freeman*, 723
15. So if it be alleged that a particular cause was tried, by and before the chief judge, it should appear that one or both of the other judges assisted to try it, or that they were unable or disqualified to sit on the trial. *Id.*

See SEARCH WARRANT, 1.
" FRAUDULENT REPRESENTATION, 1, 2, 3.
" INDICTMENT.
" VARIANCE, 1, 2.

POOR DEBTOR.

A certificate of jail commissioners, setting forth an execution for a sum different from that on which the debtor is committed, will not authorize his discharge, although the proper oath may have been administered to him. *Holbrook et al.* v. *Pearce et al.*, 616

POSSESSION.

1. In the case of an alleged continued possession, or a joint possession, of property, such as to render a sale or assignment fraudulent in law, the jury should not be instructed that, if they find certain alleged facts proved, they will be evidence of such a possession, or joint possession, as to render the sale or assignment thus fraudulent; but the question of possession or joint possession should be left to them, to be decided from the facts they shall find proved, with general instructions, as to what constitutes possession. *Hall* v. *Parsons*, 358
2. The claiming title, and payment of taxes upon unoccupied lands, is no *adverse* possession. *Reed* v. *Field & Briggs*, 672

PRACTICE.

1. This court will not, on appeal, direct any question of fact to be ascertained by a jury. *Briggs & Edmonds* v. *Shaw & Thrall*, 78
2. The supreme court will not revise the action of a county court, upon their own rules. *Carpenter* v. *Thayer et al.*, 552
3. On an appeal from chancery, the supreme court will not send an issue of fact to the county court to be tried by a jury. *Briggs et al.* v. *Shaw et al.*, 785
4. The supreme court will not send a cause back to the chancellor, or continue it, on account of the pendency of a bill of review. *Lane* v. *Marshall et al.*, 785
5. Where exceptions were taken by the defendant, involving the right of recovery, and by the plaintiff as to the rule of damages, it was decided that the defendant was entitled to open the argument and to reply. *Peters* v. *Farnsworth*, 786
6. In order to the granting of a bill of divorce under the clause of the statute authorizing a divorce when the husband grossly, wantonly, and cruelly refuses or neglects to provide a maintenance for the wife, being of sufficient ability, something more must be shown than a mere wilful desertion and refusal of support. *Mandigo* v. *Mandigo*, 786
7. A party will be entitled to the usual time, under the rule, for filing exceptions to a report of auditors, after a motion to recommit the report has been disposed of. *Cummings* v. *Fullam*, 787
8. Exceptions may be entered in the supreme court, although a term of that court may have intervened after the taking of the exceptions, in a case where a motion for a new trial is pending, until after such intervening term. *Stimpson* v. *Cummings*, 787
9. The general rule that the party prevail-

ing is entitled to costs, is applicable to the case of an appeal, by executors, from a decree of the probate court disallowing a will. *Heirs of Brigham* v. *The Executors of the same*, 788

PRINCIPAL AND AGENT.

1. A letter of attorney, authorized the agent to sell at the best prices, by public or private sale, as he might think most advantageous, and to execute such contracts, agreements, conveyances and assurances, and perform such acts as might be necessary to perfect the sale;—*Held*, that he might execute a deed with covenants of warranty which would bind the principals. *Peters* v. *Farnsworth*, 155
2. An officer may maintain an action against a principal, for goods sold on an execution to his agent, notwithstanding his return on the execution describes the sale to have been made to the individual who acted as agent,—the agency not having been disclosed at the time of purchase. *Carney* v. *Dennison & Gore*, 400

PRINCIPAL AND SURETY.

1. The payee of a note, after having taken security of the principal, may give up such security, and call upon the undersigner of the note, provided he acts in good faith, and only with reference to his own interest. *Crane* v. *Stickles & Trustees*, 252
2. The payee of a note is not obliged to regard the directions of the surety. *Id.*
3. The recognizance, taken by a justice in the proceedings under the bastardy act, conditioned, "that the principal shall abide such order or orders as the county court shall make in the premises," is holden as a security for the performance of the order until a new recognizance shall have been entered into, unless discharged by a surrender of the principal *Simmons* v. *Adams & Parmalee*, 677

PROBATE COURT.

1. Although, by the laws in force in 1793, at the decease of a testator, the devisees could have compelled a division of the estate held under the will, only in the supreme court, yet it was competent for the legislature to change the tribunal for making the partition; and when made it must be according to the laws then in force. *Bull* v. *Nichols*, 329
2. It is no valid objection to the jurisdiction of the court of probate, under the act of 1821, in making partition of lands held jointly by several devisees, that some of them had alienated their interest before the commission was applied for. *Id.*
3. Though an assignee of some of the devisees, may, while holding the lands in common, have put betterments thereon, yet the commissioners to divide it, must appraise it at its then value, and make the division accordingly. *Id.*
4. The appellant from a decree of the probate court, having filed exceptions to which the appellee has demurred, must be confined to such exceptions. *Id.*

See WILL, 1.

PROMISSORY NOTE.

1. A note promising to pay J. & Wainwright a given sum in one from the first of October following the date, in cattle, or in grain the first January following was held void for uncertainty. *R. & J. Wainwright* v. *Straw & Cunningham*, 216
2. The payee of a note, after having taken security of the principal, may give up such security, and call upon the undersigner of the note, provided he acts in good faith, and only with reference to his own interest. *Crane* v. *Stickles & Trustees*. 252
3. The payee of a note is not obliged to regard the directions of the surety. *Id.*
4. Chancery will not relieve the maker of a note, given upon the compromising and settlement of a suit brought for the *bona fide* purpose of a recovery, and in which there was evidence tending to prove the allegation on which it was founded, unless it appear that the maker was incapable of understanding the nature, extent and effect of the business he was transacting, or was so overreached as to make the retaining of the note unconscionable. *Paris* v. *Dexter*, 379
5. The repeal of the proviso to the statute of 1798, allowing equitable defences to promissory note snegotiated, took full effect on the first day of January, 1837, and cut off all such defences accruing after that date, though the notes bore date anterior to that time. *Farr* v. *Brigham*, 557
6. Such defences depend on the law in force at the time they accrue, and not necessarily upon the law in force at the time the contract was executed to which they are offered. *Id.*
7. It is no valid objection to the sustaining

of an action upon a promissory note, by the endorsee, that the note was made payable to the order of, and endorsed by one of the members of a firm. *Norton* v. *Downer et al.* 569

8. *Dictum.* Such note, when endorsed, is *prima facie*, a good cause of action in the hands of the endorsee. *Id.*

9. In a case where a note was to become obligatory upon there being a failure of title in a third person to certain premises, it was held unnecessary, in an action on the note, to show such failure by an adjudication of a court of competent jurisdiction, in an action brought to try the title. *Reed* v. *Field & Briggs*, 672

10. B. N. and K. executed notes to M'G. on the purchase of a saw-mill. Afterwards B. sold to N. his share, without making any contract that N. should indemnify him against the notes to M'G. N. and K. afterwards sold the mill to G.;—*Held*, that B could not defend against the notes he gave to M'G. in consequence of any executory contract between M'G. and N. to which B. was not a party. *M'Gregor* v. *Bugbee*, 734

11. N. could lawfully dispose of the notes or property received on his sale to G. without applying the proceeds to the benefit of B. *Id.*

QUI TAM.

See HUSBAND & WIFE, 1.

R

RECOGNIZANCE.

1. A recognizance entered into before the county court, by a person in custody on a criminal charge, that the respondent shall make his personal appearance before the court then sitting, and remain from time to time, and from day to day, and shall answer, and shall abide the orders and decrees of the court, and not depart without leave, is a legal and valid recognizance. *Treasurer of Vermont* v. *Rolfe*, 9

2. The recognizance, taken by a justice in the proceedings under the bastardy act, conditioned, "that the principal shall abide such order or orders as the county court shall make in the premises," is holden as a security for the performance of the order until a new recognizance shall have been entered into, unless discharged by a surrender of the principal. *Simmons* v. *Adams and Parmalee*, 677

RECEIPTORS.

See CONTRACT, 3.

REDEMPTION, EQUITY OF.

Length of time, short of the period which will bar redemption, may afford a strong presumption against a claim set up as an equitable right of redemption, resting wholly on oral testimony. *Conner* v. *Chase et al.* 764

S

SALE OF PERSONAL PROPERTY.

1. Standing trees may be the subject of a parol sale, so as to give the purchaser a right to go upon the land to cut them; and when cut, and left upon the land, they become the personal property of the purchaser. *Yale* v. *Seely et al.* 221

2. Trees so cut, and left upon the land, do not pass with the land, in consequence of their having been attached to the soil, but remain subject to the legal rights of the actual owner, like any other personal property; and any person purchasing the timber thus cut, and situated, has a legal right to enter upon the land to take it away; and should the owner of the land attempt to hinder him in the enjoyment of the right, he would be justified in using so much force as might be necessary to overcome the hindrance. *Id.*

SEARCH WARRANT.

In a plea of justification under a search warrant, it is not necessary to allege that the complaint was signed, or any minute made of the day, month and year when exhibited; or that any recognizance for cost was given, or that the warrant was returned; nor is it necessary to state the grounds of suspicion of the person praying out the warrant. *Chipman* v. *Bates*, 51

SELECTMEN.

The selectmen have no authority to make a new appointment to any town office, unless a vacancy occurs, in one of the modes specified in the statute. *Cummings* v. *Clark et al.* 653

SETTLEMENT.

1. While the act of 1801, relating to legal settlement, was in force, the rule of the common law was in force, that an illegitimate child has its settlement where born, and cannot gain a derivative settlement from its mother. *Manchester* v. *Springfield*, 385
2. Under the act of 1801, a woman, living with a man as his wife, under a void marriage, was not included in a warning of the man and his family; and she might gain a settlement by residence. *Id.*
3. A person, under the act of 1817, does not gain a legal settlement by residing in a town seven years, unless such person had, previously, a legal settlement in some other town in this state. *Sutton* v. *Burke*. 720
4. Under the first section of the act of 1797, relating to legal settlements, it was a sufficient payment for real estate purchased of a greater value than $100, if the purchaser acquired a title to the same, and paid at least $100 towards it, provided no lien was created upon the estate for the balance of the purchase money. *Kirby* v. *Waterford*, 753

See STATUTE, CONSTRUCTION OF, 1.
" BASTARD, 1.

SHERIFF.

1. A sheriff is liable for taking insufficient bail on mesne process, and can only justify by showing that the bail was *amply sufficient* when taken. *Harrington* v. *Bogue*, 179
2. An apparent sufficiency will not justify him. *Id.*
3. *Quere* — Whether an officer is liable for omitting to make a return of *nulla bona*. *Id.*
4. When a deputy sheriff sold goods on execution, on a credit of three months, by direction of plaintiff's attorney; — *Held*, that the sheriff was not responsible for his neglect to return the execution, &c., as he did not act officially. *Kimball & Co.* v. *Perry*, 414

SLANDER.

1. In actions for slanderous words, the jury are to determine the sense in which the defendant spoke the words, and the truth of the innuendos alleged. *Smith & Smith et ux.* v. *Miles*, 245
2. In cases where the words are equivocal, or are spoken with reference to circumstances supposed to be in the minds of the hearers, which go materially to qualify their import, the condition and circumstances of the subject-matter connected with the charge may be inquired into, and the sense in which the hearers understood the words, and in which they supposed the defendant intended them to be received, may be considered by the jury. *Id.*
3. But the mere fact that the defendant charged the plaintiff with theft, in regard to an article of property which had been either loaned or sold to the plaintiff, but which sale or loan was not known to those, in whose presence he made the charge, will not be a ground of showing, either that the act charged was impossible, or that the charge was not seriously made; nor, is it competent to go in mitigation of damages, except as tending to show the words were spoken in heat and haste. *Id.*

STATUTE, CONSTRUCTION OF.

The health ordinarily enjoyed by men of health, and the physical ability ordinarily possessed by men of sound bodies, constitute the 'healthy and able bodied,' within the meaning of the first section of the act of 1797, relating to legal settlement; and this, notwithstanding there may have been a casual and temporary illness, or bodily unsoundness, producing an occasional and temporary effect upon the capacity to gain a livelihood by bodily labor. *Starksboro* v. *Hinesburgh*, 200

See ABSCONDING DEBTOR.
" DIVORCE.
" HIGHWAY, 4.
" SETTLEMENT, 1, 2, 3.
" U. S. LAWS, 1, 2.
" WILL, 5.

T

TAXES.

The second section of the act of the 10th of November, 1802, exempting from taxation the property of the President and Professors of the University of Vermont, to the value of one thousand dollars is in full force, and not repealed. *Wheeler* v. *Lane*. 26

See GRAND LIST, 4, 5.

TENANTS IN COMMON.

1. A conveyance by a lessor, to one of two joint tenants, under a lease reserving rent, of all his title and interest in the premises, does not give the grantee a right to maintain ejectment against his co-tenant for non-payment of the rent accrued to his grantor. *Birney* v. *Birney*, 136
2. An assertion, by a joint owner of land, of an exclusive title to the whole, and a contracting to sell the whole, are evidence of an *adverse* possession, and such an ouster as to enable the co-tenant to maintain ejectment. *Carpenter* v. *Thayer et al.*, 552
3. A sale of a personal chattel, by one tenant in common, is not such a destruction of the chattel, as to enable the other tenant in common to maintain an action of trover against the purchaser. *Sanborn* v. *Morrill*, 700

TENDER.

1. A tender of money or specific articles of property, is not, technically, a payment. *Downer* v. *Sinclair et al.*, 495
2. Where one agrees with his judgment debtor to receive from him, in payment, within a specified time, certain articles of his manufacture, and the debtor has the property ready and sets it out at his shop, within the time, for the purpose of payment, it will be a good defence, under a plea in bar, to an action on the judgment. *Id.*
3. Where a party intends to rely on a tender, he cannot make it on a trial before an auditor, and leave the money in his hands, but must bring it into court. *Wing* v. *Hurlburt*, 607

TIMBER.

See SALE OF PERSONAL PROPERTY, 1, 2.

TOWNS.

1. A town meeting warned on the 1st day, and holden on the 12th day, of the same month, is irregular, and its proceedings are not binding on the town. *Pratt et al.* v. *Swanton*, 147
2. A subsequent treating of such meeting as valid, either by the town officers or by any portion of the inhabitants of the town, will not be sufficient to ratify the proceedings of the meeting on the part of the town. *Id.*
3. Towns cannot be made liable for the expense of building a road, by subsequently repairing the same, and suffering the public to use it as a highway. *Id.*
4. It is the duty of a town, in the construction and repair of roads, to provide for the reasonable safety of travellers in reference to such accidents as may be expected to happen on such roads. *Kelsey* v. *Glover*, 708
5. When a town has expended money in making a public road, and a turnpike is laid on the same road, the town have no claim against the turnpike company for compensation for making the road, which can be enforced at law, or in equity. *Barnet* v. *Passumpsic Turn. Co.*, 757

See DAMAGES.
" PAUPER, 2, 5, 6, 7.
" HIGHWAYS, 2.

TRESPASS.

1. To maintain trespass, *quare clausum fregit*, the plaintiff must have either a title, or exclusive possession. *Bakersfield Cong. Soc.* v. *Baker & Potter*, 119
2. A meeting-house was built by an incorporated association by the name of the Union Society, for the use, exclusively, of the Religious Congregational Society; — *Held*, that the latter could not maintain trespass, *quare clausum fregit*, against a pew-holder, and another who occupied the pulpit on the Sabbath, and prevented them from performing divine service there. *Id.*
3. The owner of a cow, accustomed to hook — the vicious propensity being known to her owner — is liable for damage done by her, although it be done in the highway against the land of her owner, and while going to her usual watering place. *Coggswell* v. *Baldwin*, 404
4. If the injury, in such case, is occasioned by the negligence of the owner of the animal injured, he will not be entitled to recover. *Id.*

See OFFICER, 1, 5, 6.

TROVER.

1. Where an officer sells property on execution to the creditor, and his return appears regular, it is not competent for the debtor in the execution to bring trover against the creditor, on the ground of any irregularity in the proceedings of the officer, although the creditor himself may have advised it. *Hale* v. *Miller*, 211

2. The only proper remedy for such an injury, is by action on the case against the officer. *Id.*

3. Trover may be maintained by an officer, against a debtor, for property which had been owned and possessed by the debtor, and receipted by him to the officer, as attached, though it was not actually seized, or even seen, by the officer. *Pettes* v. *Marsh*, 454

4. A sale of a personal chattel, by one tenant in common, is not such a destruction of the chattel, as to enable the other tenant in common to maintain an action of trover against the purchaser. *Seaborn* v. *Morrill*, 700

TRUST.

1. When one person purchases lands with his own money, and takes a deed to another, a trust results by operation of law to the person making the purchase; and the same result follows where a feme covert purchases with the consent of her husband, for her separate use, with means which she was the meritorious cause of acquiring. *Pinney et al.* v. *W. & C. Fellows*. 525

2. Though the deed recites the consideration to have been received from the nominal purchaser, yet the cestui que trust will be allowed to prove, by the trustee himself, that it was her money. *Id.*

3. A part payment of the consideration, at the time of the purchase, will charge the land with the trust, *pro tanto*. *Id.*

4. The statute of 1797 did not require that the *creation* of a trust in lands should be by writing, but simply that it be manifested and proved by some writing. *Id.*

5. The deposition of the trustee, subscribed and sworn to by him, fully proving the trust, was held a sufficient manifestation and proof of it, in writing, in a suit between the cestui que trust and an attaching creditor of the trustee. *Id.*

6. The wife being in the open and exclusive use and possession, in conjunction with her husband, of her trust estate, for a series of years, will affect the attaching creditor of the trustee with notice of her trust interest, and place him in no better situation than the trustee himself. *Id.*

7. *Quere.*—Is the attaching creditor, as to the time of notice, to be treated as a purchaser of the estate before levy of his execution? *Id.*

TRUSTEE PROCESS.

1. A creditor may maintain a trustee process against the vendee of property, fraudulently purchased to keep it from being attached, and is not obliged to try the validity of the sale by attaching the property. *Crane* v. *Stickles & Trustees*. 258

2. The county court have original jurisdiction of a suit, upon a promissory note, exceeding forty dollars, and less than one hundred dollars, where the suit is by trustee process. *Hobart* v. *Wardner*. 564

3. Such suit will not be dismissed for want of jurisdiction in the county court, though the trustee should, on trial, be dismissed in cases where the principal defendant appears in the suit, or where the writ issues as a general attachment, and is served by attaching personal property in possession. *Id.*

4. A promissory note, executed in, and made payable to citizens of, the state of Massachusetts, although the maker reside in this state, is not subject to our trustee process, it being, by the law of the place of contract, exempt from such process. *Bayliss* v. *Trustees of Houghton & Co.* 686

TURNPIKE.

1. Parol testimony may be admitted to prove the division of a turnpike road into sections by the turnpike inspectors, for the purpose of sale, under the act of November 1, 1838, entitled "an act to facilitate the rendering of turnpike roads free roads." *State* v. *Shrewsbury*. 283

2. Evidence of the motives with which a sale and transfer of a section of a turnpike road, under that statute, were made, is not admissible. *Id.*

3. The appointment of an agent by a turnpike company to procure a division of their road into sections, and directing him to dispose of, and convey the same —a written application of the agent to the turnpike inspectors to divide the road—a division of the road by the inspectors—a conveyance of a section of it by the agent to persons styled "a company of individuals," and notice of the sale by the agent to the selectmen of a town through which the section runs, are sufficient to establish that such section has become a public road, so as to impose upon the town an obligation to keep the same in repair. *Id.*

4. The act of the legislature, passed in 1839, authorizing the supreme and coun-

ty courts to take the franchise of a turnpike corporation for a public highway, is constitutional. *Armington et al.* v. *Barnet, Ryegate and Newbury.* 745

5. When a town has expended money in making a public road, and a turnpike is laid on the same road, the town have no claim against the turnpike company for compensation for making the road, which can be enforced at law, or in equity.—*Barnet* v. *Passumpsic Turn. Co.* 757

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USURY.

Payments made under an usurious contract, to an amount within that of the debt and legal interest, are to be treated as payments, generally, and in the case of a bill to foreclose a mortgage, may be insisted on by way of answer. *Ward* v. *Sharp et ux.* 115

UNITED STATES LAWS.

1. Under the act of Congress of 1838, commonly called the neutrality act, the collectors and other officers therein mentioned, were authorized to seize and detain vessels having arms, &c. on board, passing towards a foreign state or colony, conterminous with the United States, when they had reason to believe that the vessels, &c. were to be employed in a military expedition or operation against such state or colony. *Stoughton* v. *Mott.* 162

2. The term "*frontier*," means something more than the boundary line. It means a tract of country contiguous to the line; and it is not material whether such vessels, &c. were actually intended to be passed across the boundary line into the foreign territory. *Id.*

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VARIANCE.

1. The supreme court can take no notice of a variance between the proof and an indictment, unless exceptions were taken, on trial, for that cause. *State* v. *Chandler & Keyes.* 425

2. An abutment to a bridge, as matter of description, is part of the bridge; and when a declaration alleged an injury to have been occasioned by the insufficiency of a bridge, and the proof was, that the defect and insufficiency was in the abutment—*Held*, that this was not such a variance as to be ground for reversing the judgment. *Bardwell & Huntington* v. *Jamaica,* 438

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See PLEAS & PLEADING, 12, 13.

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WILL.

1. The probate of a will made in 1781, it not appearing that the heirs, &c., were notified, is good. The judge of probate had jurisdiction, and his proceedings are presumed to have been regular after such a lapse of time. *Giddings & Wife et al.* v. *Smith et al.*, 344
2. A will made in 1774, and proved in 1781, may be read at this time, without further proof, when both parties claim under the same devise. *Id.*
3. In such a will, a devise to E. H. and the lawful heirs of her body, gave her an estate tail. *Id.*
4. Such an estate is not barred by the deed of herself and husband, acknowledged in 1797, before a justice of the peace. *Id.*
5. Her issue, after her death, are not estopped from claiming the estate, in consequence of any covenant of warranty contained in the deed. The statute of conveyances did not enable a feme tenant in tail, to convey by a deed of herself and her husband. *Id.*
6. A suit commenced by the children of the feme is not barred by the statute of limitations, when the suit was brought within fifteen years after the death of both husband and wife. *Id.*

WITNESS.

1. A witness may be compelled to give testimony, the tendency of which may be to subject him to pecuniary loss. *Ward* v. *Sharp*, 115
2. A mere agent or servant, may be a witness for his principal, from public convenience and necessity. *R. & J. Wainwright* v. *Straw & Cunningham*, 215
3. Evidence of common prostitution is not admissible to impeach a witness. *Spears* v. *Forrest*, 435
4. Certain notes of hand having been delivered by S. C. to S. as an indemnity, and the same having come into the hands of, and been collected by, J. C., it was held, in an action in favor of S., against J. C., to recover the amount thus collected, that S. C. was not a competent witness to prove that the notes had been obtained by him, with the consent of the attorney holding them for collection, and had been sold by him to the defendant for a valuable consideration. *Stimson* v. *Cummings*, 477
5. Held, that the town clerk of the town where title deeds are to be recorded might be called as a witness to prove that no title of record appeared in a person, who professed to convey the title, except under a vendue deed, and that this was competent evidence tending to prove a want of title in the person so conveying the land. *Reed* v. *Field & Briggs*, 672

WRITING.

1. Where two written instruments are made at the same time, relating to the same subject-matter and to one entire transaction, they are to be construed together, and one may qualify the other. *Reed* v. *Field & Briggs*. 67

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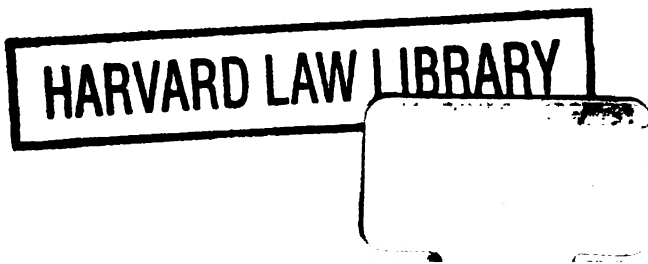
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